Supreme Court of the United States.

October Term, 1931.

No. 477.

Boston and Maine Railroad,
Petitioner,

v.

Fred Armburg,
Respondent.

On Writ of Certiorari to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts.

BRIEF FOR PETITIONER.

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Supreme Court of the United States.

OCTOBER TERM, 1931.

No. 477.

BOSTON AND MAINE RAILROAD,
PETITIONER,
v.
FRED ARMBURG,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

BRIEF FOR PETITIONER.

GENERAL STATEMENT.

This case comes before this Court upon a writ of certiorari to the Municipal Court of the City of Boston of the State of Massachusetts, petition for which was granted November 2, 1931 (r. p. 43).

The cause to be reviewed is an action of tort for personal injuries, wherein judgment was rendered by the Municipal Court of the City of Boston in favor of the respondent, the plaintiff below, against the petitioner, the defendant below.

The questions involved are as to the constitutionality and validity, under the Commerce Clause of the Federal

Constitution, of the Massachusetts Workmen's Compensation Law, Massachusetts General Laws, c. 152, and certain parts thereof, in their application to the petitioner, a railroad corporation engaged in both interstate and intrastate commerce.

The petitioner and the respondent are herein respectively referred to as the defendant and the plaintiff.

The case was tried before a justice of the Municipal Court of the City of Boston, who made findings of fact and rulings of law, found for the plaintiff and reported his rulings to the Appellate Division of that Court (f. pp. 25, 26).

The Appellate Division dismissed the report, and the defendant appealed from the order of dismissal to the Supreme Judicial Court of the State, which affirmed that order (r. p. 31), and the Municipal Court thereupon entered judgment for the plaintiff on its finding (r. p. 3).

Opinions of the Courts Below.

The opinion of the Supreme Judicial Court of Massachusetts was rendered September 12, 1931, and is reported in Mass. Adv. Sheets, 1931, p. 1751, under the title "*Armburg* v. *Boston and Maine Railroad.*" It is included at page 31 of the record. The opinion of the Appellate Division of the Municipal Court of the City of Boston is not reported. It is included at page 28 of the record.

Jurisdiction.

Jurisdiction to review this cause exists under Judicial Code, sec. 237 (*b*), as amended by Act of February 13, 1925, c. 229, sec. 1; 43 Stat. 937, whereby this Court is authorized by certiorari to review any cause "where is drawn in question the validity of a statute of any State on the ground

of its being repugnant to the Constitution, treaties, or laws of the United States."

The date of entry of the judgment in the cause sought to be reviewed was September 25, 1931 (r. p. 3). The judgment was rendered by the Municipal Court of the City of Boston, the highest court of the State in which a decision in said cause could be had.

The order granting the petition for a writ of certiorari was entered November 2, 1931 (r. p. 43).

A. The Massachusetts Workmen's Compensation Act.

The statute, the validity of which is drawn in question, is the Massachusetts Workmen's Compensation Act, so called, now comprising Massachusetts General Laws, c. 152, (Appendix, p. 63) and section 66 thereof (Appendix, p. 85).

The law was originally enacted as Massachusetts Acts 1911, c. 751, entitled "An Act relative to payments to employees for personal injuries received in the course of their employment and to the prevention of such injuries," and section 66 above referred to appeared in the original enactment as part 1, section 1, of that chapter.

General Laws, c. 152, entitled "Workmen's Compensation," comprising the Act as constituted, including amendments, at the time of the plaintiff's injury, July 8, 1929, is, except for sections which can have no possible bearing upon the questions involved, set forth in the Appendix (pp. 63-86, *infra*).

For convenience and brevity, chapter 152 is hereinafter referred to as the Act.

The Act comprises a system whereunder compensation of employees for injuries received in the course of their employment is secured and paid by means of insurance effected by their employers referred to in the Act as "insured persons" (sec. 1; Appendix, p. 66). We will endeavor

to state the general frame of the Act as concisely as possible.

Insurance companies, referred to as insurers (sec. 1; Appendix, p. 66) generally are authorized to insure payment of the compensation and to classify risks and premiums, subject to the approval of the Commissioner of Insurance, whose decision is subject to review by the Supreme Judicial Court (sec. 52; Appendix, p. 83, *infra*). The right to compensation under such insurance does not depend upon fault in the employer or absence of fault in the employee, but is absolute except in case of the employee's serious and wilful misconduct (secs. 26, 27; Appendix, p. 76), and the compensation is paid in weekly instalments, the duration whereof is in general regulated by the length of total or partial incapacity of the employee and the amount thereof by his earning capacity (secs. 29-31, inclusive, 34, 35; Appendix, pp. 76-79, *infra*). In event of certain specified injuries additional payments are provided for (sec. 36; Appendix, p. 79, *infra*).

In case the injury is due to the serious and wilful misconduct of the employer, or one exercising the powers of superintendence, double compensation is awarded.

> "In such case the insured shall repay to the insurer the extra compensation paid to the employee" (sec. 28; Appendix, p. 76, *infra*).

In case the employer does not insure, he is, by the following quoted sections, deprived of the common-law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant in an action by the employee.

> "Section 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence—
>
> "1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury.

"Section 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person" (Appendix, pp. 85-86, *infra*).

By sections 21 and 22 (Appendix, p. 74, *infra*), insured persons, upon securing their policies, are required to give notice to employees or to those about to enter their employ that they have provided for payment to injured employees by the insurer, and employers discontinuing insurance must give notice thereof to their employees.

Employees are not obliged to accept insurance in lieu of legal remedies, but by section 24 (Appendix, p. 75, *infra*), it is provided as follows:

"Section 24. An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. . . ."

Employees thus reserving their common-law rights are, by section 68 (Appendix, p. 86), excluded from the operation of the State Employers' Liability Act, General Laws, c. 153 (Appendix, p. 86), which gives rights of action thereunder in certain cases involving the negligence of superin-

tendents and certain other employees in positions of authority.

> "Section 68. Chapter one hundred and fifty-three and sections four and seven to ten, inclusive, of chapter two hundred and twenty-nine shall not apply to employees of an insured person, nor to laborers, workmen or mechanics employed by any county, city, town or district subject to sections sixty-nine to seventy-five, inclusive, while this chapter is in effect."

As far as injuries occurring in the State are concerned, at least, statutory rights of action may not be reserved under section 24—

> *McDonnell* v. *Berkshire Street Ry. Co.*, 243 Mass. 94—

and the phrase "or under the law of any other jurisdiction in respect to an injury therein occurring" was added by amendment to cover the case of an accident occurring in another State.

> *McLaughlin's Case,* Mass. Adv. Sheets, 1931, p. 243.

An employee who has not reserved his common-law rights under section 24 or who has waived such reservation, who is injured in the course of his employment, is, by section 26 (Appendix, p. 76, *infra*), entitled to compensation from the insurer if his employer is an insured person. In case death results the payments are made to dependents (sec. 31; Appendix, p. 77).

By sections 41, 42, 43 (Appendix, pp. 80-81) it is provided that proceedings for compensation may not be maintained unless the employee gives the insurer or insured reasonable notice of the injury as soon as practicable and makes claim therefor within six months after the injury, with liberal

exceptions to such requirements (sec. 45; Appendix, p. 81).

By section 45 (Appendix, p. 81) an injured employee is obliged to submit to an examination by a physician furnished by the insurer or insured.

Questions and disputes arising under policies of insurance are in the first instance determined by the Department of Industrial Accidents (secs. 7, 8, 16; Appendix, pp. 68, 72), and are subject to review by the Courts on questions of law (sec. 11; Appendix, p. 69).

By section 54 (Appendix, p. 84, *infra*) it is provided:

> "Policies of Workmen's Compensation Insurance issued or delivered in the commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by this chapter, whatever other contingencies may be insured by riders attached thereto or endorsements thereon."

By section 64 (Appendix, p. 85) the insurer is required to make and enforce reasonable rules and regulations for the prevention of injuries on the premises of insured persons, and—

> "for this purpose inspectors of the insurer shall have free access to all such premises during regular working hours."

An employee within the meaning of the Act is defined to be—

> "Every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer" (sec. 1 (4); Appendix, p. 66).

B. The Case and Rulings.

The cause in which the judgment was entered was an action of tort at common law, wherein by his declaration the plaintiff alleged that, while traveling in a motor car over the tracks of the defendant, the motor car was derailed by reason of the negligence of the defendant, its agents and servants, and he received injuries (r. pp. 26, 27).

The defendant set up in its answer *inter alia* that the plaintiff's injuries were due solely to the negligence of a fellow servant, and that the plaintiff assumed the risk of the same (r. p. 27).

The plaintiff made no contention or suggestion of any claim of liability of the defendant under the State Employers' Liability Act, General Laws, c. 153 (Appendix, p. 86), whereunder the damages recoverable are limited to $4000 and notice of injury is a condition of the right (Massachusetts General Laws, c. 153, secs. 5, 6; Appendix, p. 87).

Nor would any such contention have been open under his declaration, which asserted only a common-law cause of action (r. p. 26).

The defendant, at the time of the plaintiff's injury, was a common carrier of goods and passengers for hire and owned or leased railroad tracks which it used in its business. Its tracks extended from point to point within the State of Massachusetts and also from points in Massachusetts to points in Maine, New Hampshire, Vermont, and New York, and it was engaged in the business of transporting both freight and passengers over such tracks from point to point within the State of Massachusetts and from points within that State to points in other States and from points in other States to points in Massachusetts (r. p. 5). It was a railroad corporation engaged in both interstate and intrastate commerce (r. p. 4).

The plaintiff, who was an employee of the defendant (r. p. 5), was not employed in interstate commerce at the time of his injury, but was employed in intrastate commerce

★

It appeared in evidence that the defendant had about 1300 miles of track outside of Massachusetts and about 700 miles inside that state (r. p. 9).

It also appeared in evidence that the defendant carried 23,922,566 tons of freight during the year 1929; that only 15 per cent of its freight business did not involve the use of some other railroad in carrying the freight to its destination (r. p. 20); that of the tonnage carried to connecting carriers, tonnage carried intrastate would amount to a very small proportion, 10 per cent or under (r. p. 21).

It also appeared that the total number of employees of the defendant for the month of July, 1929, was 3971 conductors, firemen, brakemen, and engineers paid on an hourly basis, 15,778 other men paid on an hourly basis, and 2208 men paid on a daily basis (r. p. 14); that the payroll for that month was $411,000 for the men paid on a daily basis, $811,062 for the train and engine service men, and $1,921,971 for the (other) men paid on an hourly basis (r. p. 15).

(r. p. 5). The defendant was not a subscriber under the provisions of the Act (r. p. 5), that is to say, it had not provided by insurance for compensation to its employees, in case of injury.

The defendant requested the trial Court to rule as follows (r. pp. 23-25):

"3. There is no evidence to warrant the Court in finding that the defendant as distinguished from its servants and agents was negligent.

"4. There is no evidence to warrant the Court in finding that any negligence on the part of the defendant as distinguished from its servants and agents was the proximate cause of the injury to the plaintiff.

. . . . . .

"7. The Workmen's Compensation Act, St. 1911, chap. 751, now General Laws, chap. 152, does not apply to a railroad corporation engaged in both intrastate and interstate commerce.

"8. St. 1911, chap. 751, now General Laws, chap. 152, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"9. The defences of contributory negligence, assumption of risk, and that the injury was caused by the negligence of a fellow servant are open to the defendant in this action.

"10. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"11. St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"12. As a matter of law Connell was a fellow servant of the plaintiff.

"13. As a matter of law upon all the evidence the employee who was operating the railroad motor car at the time of the accident was a fellow servant of the plaintiff Armburg.

"14. Upon all the evidence the plaintiff is not entitled to recover in this action upon the following grounds and each of them:

"(a) Because upon all the evidence the injury to the plaintiff was caused by the negligence of a fellow servant and the defence that the said injury was so caused is open to the defendant in this action as a matter of law and constitutes a complete defence thereto.

"(b) Because as a matter of law upon all the evidence the plaintiff's injury was caused by the negligence of a fellow servant.

"(c) Because as a matter of law the defence that the injury was caused by the negligence of a fellow servant is open to the defendant in this action.

"(d) Because as a matter of law the Workmen's Compensation Act, St. 1911, chap. 751, now General Laws, chap. 152, does not apply to a railroad corporation engaged in both intrastate and interstate commerce.

"(e) Because as a matter of law St. 1911, chap. 751, now General Laws, chap. 152, is not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"(f) Because as a matter of law the defendant, which is a railroad corporation engaged in both intra and interstate commerce, falls altogether outside the operation of the Workmen's Compensation Act, St. 1911, chap. 751, now G.L. c. 152.

"(g) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, is

not applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce.

"(h) Because as a matter of law St. 1911, chap. 751, part 1, sec. 1, now General Laws, chap. 152, sec. 66, violates the commerce clause of the Federal Constitution, if it be construed as applicable to the defendant, which is a railroad corporation engaged in both intrastate and interstate commerce."

The trial Court granted requests 3, 4, 12, and 13 and ruled and found that the injuries to the plaintiff were caused by the negligence of a fellow servant, the operator of a railroad motor car upon which the plaintiff was riding, refused all of the other requests, and found for the plaintiff in the amount of $26,500 (r. pp. 25, 26). It reported its rulings to the Appellate Division of the Municipal Court (r. p. 26).

The Appellate Division of the Municipal Court entered an order dismissing the report (r. p. 27).

The Appellate Division in its opinion held that the Act, General Laws, c. 152, applies to a corporation engaged in both interstate and intrastate commerce (r. pp. 28, 29), expressed doubt as to the scope of such inclusion (r. p. 29), said that the instant case was one of purely intrastate concern and regulation, that the defendant in remaining outside of the compensation system did so on the conditions fixed by the Legislature (r. p. 29), and that its reasons, based on the difficulty of conforming its business to the system, were immaterial (r. p. 30).

It further ruled that, even assuming the necessary inclusion for insurance of all employees, the Act did not place an undue burden upon interstate commerce (r. p. 30).

It also expressed the opinion that the Legislature did not intend a present to insurers by requiring insurance upon those upon whose duties and risks there could be no collection (r. p. 30).

The defendant appealed to the Supreme Judicial Court of Massachusetts from the decision of the Appellate Division dismissing the report (r. p. 28).

The Supreme Court of Massachusetts, on September 10, 1931, entered a rescript affirming the order of the Municipal Court dismissing the report (r. p. 31), and the Municipal Court on September 25, 1931, entered judgment for the plaintiff in the sum of $28,893.41 (r. p. 3).

Massachusetts General Laws, c. 231, contains the following provisions with respect to the review of questions of law arising in the Municipal Court of the City of Boston:

> "Sec. 108. There shall be an appellate division of said municipal court for the rehearing of matters of law arising in civil causes therein, . . . Any party to a cause brought in said court after August thirty-first, nineteen hundred and twelve, aggrieved by any ruling on a matter of law by a single justice, may, as of right, have the ruling reported for determination by the appellate division when the cause is otherwise ripe for judgment, or sooner by consent of the justice hearing the same. . . . If the appellate division shall decide that there has been prejudicial error in the ruling complained of, it may reverse, vacate or modify the same or order a new trial in whole or part; otherwise it shall dismiss the report, . . .
>
> "Sec. 109. An appeal shall lie from the final decision of the appellate division to the supreme judicial court for the commonwealth. Claim thereof shall be filed in the office of the clerk of said municipal court within five days after notice of the decision of the appellate division. The appeal shall not remove the cause, but only the question or questions to be determined."

In its opinion in *Armburg* v. *Boston and Maine Railroad*, Mass. Adv. Sheets, 1931, p. 1751; r. p. 31, the Supreme Court dealt with and decided the questions whether the Act is

applicable to the defendant, the extent to which it is applicable, and whether, as construed and applied to the defendant, it imposes an undue burden upon interstate commerce and is in violation of the Commerce Clause, and invalid.

The Court decided and ruled that the jurisdiction of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce; that the Act is applicable to the defendant as to its employees while engaged in intrastate commerce; that the defendant is required to insure its employees to the extent that they are engaged in intrastate commerce and to pay premiums based on that part of its payroll rightly allocated to intrastate commerce; that, if the defendant does not insure in accordance with the provisions of the Act, it cannot interpose the common-law defenses of contributory negligence, assumption of risk, and negligence of fellow servants in actions for personal injuries brought against it by employees engaged in intrastate commerce; that the Act as so construed does not constitute a burden upon interstate commerce, and is not in violation of the Commerce Clause, art. I, sec. 8, of the Constitution of the United States, and is valid.

The above rulings are contained in the following portions of the opinion:

> "The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1754; r. p. 35).

At the conclusion of its discussion as to the application of the Act to a railroad engaged in both classes of commerce, the Court ruled:

> ". . . we think that the Act is applicable to the defendant as to its employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1758; r. p. 38).

It then proceeded to state the defendant's contention:

> "The defendant contends that thus interpreted the act is unconstitutional as applied to the defendant, in that it imposes an undue burden upon interstate commerce contrary to art. I, § 8, of the Constitution of the United States" (Mass. Adv. Sheets, 1931, p. 1758; r. p. 38).

And ruled as follows:

> "The provisions of G.L. c. 152, as herein interpreted, do not in our opinion burden the interstate commerce of the defendant. Whether the defendant shall avail itself of that act is wholly optional with it. If it does not insure in accordance with its provisions, it cannot, in common with all other employers in like situation, interpose the defences of assumption of risk, contributing negligence, or the fellow servant doctrine in actions for personal injury brought against it by its employees engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1759; r. p. 39).

And further, with respect to the validity as well as the construction of the Act, ruled:

> "If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the commissioner of insurance requires that 'Compensation Insurance policies shall not

be written except upon the basis of the entire payroll of the assured which is the subject of Insurance.' As applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts and those, if any, entitled to the benefits of St. 1927, c. 309, §§ 2, 3. That is the only payroll of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce. Such premiums would not be a burden upon interstate commerce. If such insurance would have any effect on interstate commerce, it would be purely incidental and therefore would infringe upon no constitutional inhibitions'' (Mass. Adv. Sheets, 1931, p. 1760; r. p. 40).

C. Argument on Jurisdiction.

There was thus drawn in question, and decided adversely to the defendant, the validity of the Act as applied to the defendant upon the ground of its being repugnant to the Commerce Clause, art. I, sec. 8, of the Constitution of the United States.

While in the Municipal Court no ruling that the Act as a whole was in conflict with the Commerce Clause was in terms requested, it is apparent from the above-quoted portions of its opinion that the Supreme Court assumed that question to be in issue, took cognizance of it, and decided it adversely to the defendant.

Chambers v. *Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148.
Haire v. *Rice*, 204 U.S. 291, 299.
Cissna v. *Tennessee*, 246 U.S. 289, 293.
Mallinckrodt Works v. *St. Louis*, 238 U.S. 41, 49.

Moreover, the defendant specifically requested rulings that section 66 of the Act (Appendix, p. 85) was in viola-

tion of the Commerce Clause if construed as applicable to the defendant (Requests 11, 14*h*, r. pp. 24, 25), and these requests were refused (r. pp. 25, 26).

Under these requests invalidity of other portions of the Act is obviously open in so far as the validity of section 66 may be affected thereby.

The questions raised, considered, and decided as to the conflict of the Act and section 66 with the Commerce Clause include within their scope the effect of the Act of April 22, 1908, c. 149, The Federal Employers' Liability Act, upon the power of the State to enact the legislation in question and its validity in its application to the defendant.

State legislation in such matters affecting interstate commerce as are within the police powers of the states and valid in the absence of action by Congress derives its validity not from any power granted to the states or withheld from Congress under the Commerce Clause, but from the permission of Congress implied from its failure to legislate with respect to the subject-matter. This implied permission ceases to exist when Congress evinces an intention to withdraw such authority.

Second Employers' Liability Cases, 223 U.S. 1, 55.

Texas & Pacific Ry. Co. v. *Rigsby*, 241 U.S. 33, 41.

New York Central R.R. v. *Winfield*, 244 U.S. 147, 148.

Northern Pacific Ry. Co. v. *Washington*, 222 U.S. 370.

Erie R.R. Co. v. *New York*, 233 U.S. 671.

Adams Express Co. v. *Croninger*, 226 U.S. 491, 506.

McDermott v. *Wisconsin*, 228 U.S. 115, 131.

Chicago, R. I. & Pac. Ry. Co. v. *Hardwick Elevator Co.*, 226 U.S. 426, 435.

In *Northern Pacific Ry. Co.* v. *Washington*, 222 U.S. 370, *supra*, in holding, as stated in the headnote:

> "The enactment by Congress of the Hours of Service Law, March 4, 1907, c. 2939, 34 Stat. 1415, was a manifestation by Congress of its intent to bring the subject of hours of labor of employees of interstate carriers under its control; and, although the act did not go into effect for a year after its passage, the various state laws on the subject became inoperative at once on the enactment"—

the Court say, at page 378:

> "It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a State to apply its police power for the purpose of regulating interstate commerce, in a case like this, exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State."

In *Erie R.R. Co.* v. *New York*, 233 U.S. 671, *supra*, it was held, as stated in the headnote:

> "Provisions in the Labor Law of New York of 1907 relating to the hours of service of railroad telegraph operators engaged in interstate commerce are void in so far as they attempt to regulate interstate commerce, as Congress had completely covered the field by the

Hours of Service Act of 1907, although that act did not take effect until March, 1908."

The Court say, at page 681:

"The relative supremacy of the state and National power over interstate commerce need not be commented upon. Where there is conflict the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the State ceases to exist."

In *Chicago, R. I. & Pacific Ry. Co.* v. *Hardwick Elevator Co.*, 226 U.S. 426, *supra*, in holding that, since the enactment of the Hepburn Act of June 29, 1906, c. 3591, concerning deliveries of cars in interstate commerce, it was beyond the power of a State to regulate the delivery of cars for interstate shipments, the Court say, at page 435:

"It results, therefore, that in a case where from the particular nature of certain subjects the State may exert authority until Congress acts under the assumption that Congress by inaction has tacitly authorized it to do so, action by Congress destroys the possibility of such assumption, since such action, when exerted, covers the whole field and renders the State impotent to deal with a subject over which it had no inherent but only permissive power."

The power to regulate the subject-matter was at all times in Congress by virtue of the Commerce Clause, and the former authority of the States with respect thereto was entirely permissive and resulted from the implication that Congress by inaction had tacitly authorized them to act.

Chicago, R. I. & Pac. Ry. Co. v. *Hardwick Elevator Co.*, 226 U.S. 426, *supra.*

The defendant contends that the effect of the federal Safety Appliance Acts, U.S.C. title 45, c. 1, secs. 1-7, incl., 8, 9, 11-14, incl., 16, 17, and 23 (Appendix, pp. 92-97, *infra*), requiring railroad carriers engaged in commerce to conform to certain regulations as to equipment is also open to the defendant upon the question of conflict of the Act with the Commerce Clause, although the effect of these acts was not considered by the State Court in its opinion, because by their enactment the authority of the states to pass laws affecting the subject-matter of injuries sustained by employees of such carriers, however employed, by reason of their violation, was withdrawn.

Texas & Pacific Ry. Co. v. *Rigsby*, 241 U.S. 33.
San Antonio & Aransas Pass Ry. Co. v. *Wagner*, 241 U.S. 476.

Questions as to the effect of regulatory Federal legislation under the Commerce Clause upon the validity and operation of State statutes are assumed by this Court to involve the validity of such State statutes on the ground of repugnancy to the Commerce Clause, and not merely on the ground of conflict with the regulatory laws of Congress.

Southern Railway Co. v. *Reid*, 222 U.S. 424.
Chicago, R. I. & Pac. Ry. Co. v. *Hardwick Elevator Co.*, 226 U.S. 426, *supra*.

In *Southern Railway Co.* v. *Reid*, *supra*, the plaintiff in the State Court recovered penalties imposed by a State statute for the refusal by a transportation company to accept freight. At page 426 it appears that the question involved, as stated in the railroad's brief, was: "whether the statute is constitutional as applied to interstate commerce."

The railroad's contention was thus stated by the Court, at page 434:

"The railway company resisted the demand and contended that to hold that the act was applicable to it would violate the commerce clause of the Constitution of the United States."

The judgment below was reversed upon the ground that by the Hepburn Act of June 29, 1906, c. 3591, Congress had taken possession of the field of rate making and charging for interstate shipments, and that the power of the States to legislate upon the subject was thereby superseded.

In *Chicago, R. I. & Pac. Railway Co.* v. *Hardwick Elev. Co.*, 226 U.S. 426, *supra*, where in the State court a penalty was imposed under the provisions of a State law for delay in furnishing cars upon demand, the questions raised below are thus stated, at page 427:

"It was also claimed that if the statute in question embraced interstate commerce and was applied to the requisitions for cars referred to in the complaint it would be repugnant to the commerce clause and to the due process and equal protection clauses of the Constitution of the United States. . . . The trial judge refused to give instructions asked for by the railway company embodying the constitutional objections made in its answer."

Before this Court the argument was principally concerned with the question as to the validity of the State statute, as though enacted in the absence of regulatory action by Congress. The Court, however, reversed the judgment below upon the ground as stated in the following passage, at page 433:

"We are not, however, called upon to test the merits of these conflicting contentions, since we are of opinion that by the act of June 29, 1906, 34 Stat. 584, c. 3591, known as the Hepburn Act, amendatory of the act to regulate commerce, Congress has legislated concerning

the deliveries of cars in interstate commerce by carriers subject to the act."

The question, therefore, of the validity of a State statute, because it affects a field occupied by Congress under the Commerce Clause, is involved under a claim of conflict between such State statute and the Commerce Clause.

Furthermore the question of the application of the Act to the defendant was expressly raised by specific requests in the Municipal Court (Requests 7, 8, 10, 14*d*, 14*e*, 14*f*, 14*g*, r. pp. 24, 25; see *supra*, pp. 9-11).

Although those requests did not in terms specify constitutional or federal grounds, the State Supreme Court, in dealing with the case, discussed the effect of the Federal Act upon the validity and operation of State laws with respect to the subject-matter of such a carrier's liability to employees, and by portions of the opinions heretofore quoted ruled that the State Act as construed by it was valid and operative in its application to the defendant (see pages 14, 15, *supra*).

Thus the Court in a statement of principles, which, however, it did not follow in its rulings as to the application of the State Act and its validity, discussed the effect of the Federal Act:

> "At the outset it is to be observed as the basis of this opinion that the act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce. It was said in *Seaboard Air Line* v. *Horton*, 233 U.S. 492, at 501: 'it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employés in interstate transportation by rail, all state laws upon the subject are superseded. *Second Employers' Liability Cases*, 223 U.S. 1, 55.' That statement applies also to all State laws thereafter enacted; they are void in their application to the subject of

interstate commerce, no matter how phrased." (Mass. Adv. Sheets, 1931, p. 1752; r. pp. 32, 33).

Later in the opinion, where it ruled, without qualification, that—

> "The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, pp. 1754, 1755; r. p. 35)—

it cites and quotes from decisions of this Court relative to the operation and application of State laws and the Federal Act, and says:

> "There are numerous cases where decisions of State courts have been reversed because recovery had been allowed under workmen's compensation laws when, as the United States Supreme Court held, the injury had occurred while the employee was engaged in interstate commerce and where, therefore, the State laws were inapplicable and the Federal Employers' Liability Act governed the rights and liabilities of the parties" (Mass. Adv. Sheets, 1931, p. 1755; r. p. 35).

These portions of the opinion are referred to in this connection at this point merely for the purpose of pointing out that the State Court, in making its decision and rulings, had under consideration the effect and operation of the Federal Act, and that the question of its effect upon the State Act was within the scope of its decision.

Moreover the validity of the Act was also drawn in question by reason of the finding of the trial Court that the plaintiff's injuries were caused by the negligence of a fellow servant, and the acceptance of such findings by the Supreme Court in its decision (Mass. Adv. Sheets, 1931, p. 1752; r. p. 32), and the rulings of both the trial Court and the

Supreme Court that that defense of negligence of a fellow servant was not open to the defendant.

The validity and effect of the Act as applied to the defendant was necessarily involved in the decision, and the ruling that the defense of negligence of a fellow servant was not open to the defendant could not have been made, and judgment for the plaintiff could not have been rendered, without deciding those questions adversely to the defendant.

Willson v. *Blackbird Creek Marsh Co.*, 2 Pet. 245, 250.

Craig v. *Missouri*, 4 Pet. 410, 429.

Murray v. *Charleston*, 96 U.S. 432, 444.

Kaukauna Water Power Co. v. *Green Bay &c. Co.*, 142 U.S. 254, 269.

Columbia Water Power Co. v. *Columbia Electric &c. Co.*, 172 U.S. 475, 488.

Williams v. *Bruffy*, 96 U.S. 176, 183.

Manhattan Life Ins. Co. v. *Cohen*, 234 U.S. 123, 134.

Yazoo & Mississippi Valley Ry. Co. v. *Adams*, 180 U.S. 1, 14.

In *Kaukauna Water Power Co.* v. *Green Bay &c. Co.*, 142 U.S. 254, *supra*, the Court say, at page 269:

> "This court has had frequent occasion to hold that it is not always necessary that the Federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case by the state court."

In *Yazoo & Mississippi Valley Ry. Co.* v. *Adams*, 180 U.S. 1, 14, *supra*, the Court say, at page 14:

> "'In short, the case is one of those frequently arising under the second clause of Rev. Stat. section 709, in

which the validity of a state statute under the Constitution of the United States is necessarily drawn in question, and the decision of the state court being in favor of its validity, this court will take jurisdiction, though the Federal question be not specially set up or claimed."

At page 15:

"And the fact that the Supreme Court of the State did not expressly refer to the contract clause of the Constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision."

In *Columbia Water Power Co.* v. *Columbia Electric &c. Co.*, 172 U.S. 475, *supra*, the Court say, at page 489:

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."

In *Manhattan Life Insurance Co.* v. *Cohen*, 234 U.S. 123, *supra*, the Court say, at page 134:

"Let it be conceded, as we think it must be, where the record leaves no doubt that rights under the full faith and credit clause were essentially involved and were necessarily passed upon, there would be jurisdiction to review even although such rights had not been

expressly asserted below (see *Tilt* v. *Kelsey*, 207 U.S. 43, 51); the right to review under such condition being in effect but a result of the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided."

Statement of the Case.

The case has been stated under the heading "Jurisdiction" (p. 2, *supra*).

Specification of Errors.

1. The Court below erred in ruling and holding that Massachusetts General Laws, c. 152, and sec. 66 thereof, requiring railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in intrastate commerce, or be subject to actions at common law without the benefit of the common-law defenses of negligence of fellow servants, assumption of the risk, and contributory negligence are not in violation of the Commerce Clause, art. I, sec. 8, of the Constitution of the United States and void, and that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant.

2. The Court below erred in ruling and holding that Massachusetts General Laws, c. 152, and sec. 66 thereof, requiring railroad corporations engaged in both interstate and intrastate commerce to insure their employees to the extent that they are engaged in intrastate commerce, or be subject to actions at common law without the benefit of the common-law defenses of negligence of fellow servants, assumption of the risk, and contributory negligence, are not in violation of the Commerce Clause, art. I, sec. 8, of the Constitution of the United States and void.

3. For the above reasons the Court below erred in ruling and holding that the defense that the plaintiff's injuries were due to the negligence of a fellow servant was not open to the defendant, and in entering judgment for the plaintiff.

Summary of Argument.

1.

State laws, though not purporting to operate upon interstate commerce, are in violation of the Commerce Clause and invalid if they burden interstate commerce or affect fields of legislation occupied by Congress by virtue of its power under the Commerce Clause.

2.

The relation of the interstate and intrastate commerce of railroads engaged in both, and the nature of the services of their employees, are such that the provisions of Massachusetts General Laws, c. 152, relative to insurance of employees, construed by the State Court to apply to the defendant as to its employees while engaged in intrastate commerce and to require the defendant to insure its employees to the extent that they are engaged in intrastate commerce, impose a burden upon interstate commerce, affect fields of legislation occupied by Congress by virtue of its power under the Commerce Clause, are in conflict with the Commerce Clause, and are invalid.

3.

The provisions of Massachusetts General Laws, c. 152, relative to insurance of employees, being unconstitutional and invalid as applied to the defendant, sections 66 and 67 thereof, in effect providing that in case of failure of an employer to insure its employees in accordance with its provisions, such employer is not entitled to the benefit of the

common-law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant are unconstitutional and invalid as applied to the defendant, and those defenses were open to the defendant at the trial.

ARGUMENT.

1.

State laws, though not purporting to operate upon interstate commerce, are in violation of the Commerce Clause and invalid if they burden interstate commerce or affect fields of legislation occupied by Congress by virtue of its power under the Commerce Clause.

Under the Commerce Clause the power to regulate interstate commerce is conferred exclusively upon Congress, and includes the regulation of all matter incidental to the control, advancement, and protection of interstate commerce and the agencies thereof, including the regulation and control of intrastate commerce to the extent necessary or appropriate.

Southern Ry. Co. v. *United States,* 222 U.S. 20, 27.
Minnesota Rate Cases, 230 U.S. 352, 399.
Houston & Texas Ry. Co. v. *United States,* 234 U.S. 342, 351, 353.
Baltimore & Ohio R.R. Co. v. *Interstate Commerce Commission,* 221 U.S. 612, 618.
Illinois Central R.R. Co. v. *Behrens,* 233 U.S. 473, 477.
Northern Pacific Ry. Co. v. *Washington,* 222 U.S. 370.

State laws which, either directly or by their necessary operation, tax, burden, or interfere with interstate commerce

are invalid, no matter how expressed and regardless of the purpose for which they are enacted.

New Jersey Tel. Co. v. *Tax Board,* 280 U.S. 338, 346.
International Paper Co. v. *Massachusetts,* 246 U.S. 135, 141.
Lemke v. *Farmers' Grain Co.,* 258 U.S. 50, 59.
Alpha Cement Co. v. *Massachusetts,* 268 U.S. 203, 218.
Di Santo v. *Pennsylvania,* 273 U.S. 34, 37.

The power of Congress under the Commerce Clause to regulate interstate commerce and intrastate commerce where regulation of the latter is incidental to regulation of the former is paramount and excludes the right of control and regulation thereof by the States.

Minnesota Rate Cases, 230 U.S. 352, 399.
Erie R.R. Co. v. *New York,* 233 U.S. 671, 681, 682.
McDermott v. *Wisconsin,* 228 U.S. 115, 131.
Northern Pacific Ry. Co. v. *Washington,* 222 U.S. 370, 378.
Southern Ry. Co. v. *Reid,* 222 U.S. 424, 436.
Chicago, R. I. & Pac. Ry. Co. v. *Hardwick Elevator Co.,* 226 U.S. 426, 435.
Houston, East & West Texas Ry. Co. v. *United States,* 234 U.S. 342, 351.
Texas & Pacific Ry. Co. v. *Rigsby,* 241 U.S. 33.
San Antonio & Aransas Pass Ry. Co. v. *Wagner,* 241 U.S. 476.

State legislation upon certain matters said to be within the police powers of the States and held to be valid in the absence of action by Congress, although it may affect matters within the regulatory power of Congress, derives its validity not from any power granted to the States or withheld from

Congress under the Commerce Clause, but from the permission of Congress implied from its failure to legislate with respect to the subject-matter. This implied permission and the validity of such legislation ceases to exist when Congress acts.

Adams Express Co. v. *Croninger*, 226 U.S. 491, 506.
Erie Railroad v. *New York*, 233 U.S. 671, 682.
Chicago, Rock Island & Pacific Ry. Co. v. *Hardwick Elevator Co.*, 226 U.S. 426, 435.
Reid v. *Colorado*, 187 U.S. 137, 146.
Northern Pacific Ry. Co. v. *Washington*, 222 U.S. 370, 378.
McDermott v. *Wisconsin*, 228 U.S. 115, 131.
Mondou v. *N.Y., N.H. & H. R.R. Co.*, 223 U.S. 1, 55.

2.

The relation of the interstate and intrastate commerce of railroads engaged in both, and the nature of the services of their employees, are such that the provisions of Massachusetts General Laws, c. 152, relative to insurance of employees, construed by the State Court to apply to the defendant as to its employees while engaged in intrastate commerce and to require the defendant to insure its employees to the extent that they are engaged in intrastate commerce, impose a burden upon interstate commerce, affect fields of legislation occupied by Congress by virtue of its power under the Commerce Clause, are in conflict with the Commerce Clause, and are invalid.

It is a matter of common knowledge that in the operation of a railroad engaged in both interstate and intrastate traffic, the two kinds of traffic are to a great extent carried on by the same employees; that the two kinds of traffic and the services of employees engaged in the same are to a

great extent so commingled as to be inseverable and indivisible, so that whatever affects intrastate commerce and the rights of employees engaged therein necessarily affects interstate commerce.

To this extent the power of Congress under the Commerce Clause is paramount and exclusive over intrastate commerce, and in those fields in which Congress has manifested an intention to assume control, State laws, although they may purport to operate upon intrastate commerce, are in violation of the Commerce Clause and invalid.

The Minnesota Rate Cases, 230 U.S. 352.
Houston & Texas Ry. v. *United States*, 234 U.S. 342.
Northern Pacific Ry. v. *Washington*, 222 U.S. 370.
Baltimore & Ohio R.R. Co. v. *Interstate Commerce Commission*, 221 U.S. 612.
Southern Ry. Co. v. *United States*, 222 U.S. 20.
Interstate Commerce Commission v. *Goodrich Transit Co.*, 224 U.S. 194.

In the *Minnesota Rate Cases*, 230 U.S. 352, *supra*, in speaking of the power of Congress under the Commerce Clause, the Court say, at page 399:

> "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of Federal power. The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited

by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

In *Houston & Texas Railway* v. *United States*, 234 U.S. 342, *supra*, in holding that under the Act to Regulate Commerce, Act Feb. 4, 1887, c. 104, the Interstate Commerce Commission had power to regulate intrastate charges of an interstate carrier to the extent necessary to prevent discrimination against interstate traffic, the Court say, at page 351:

". . . Its authority, extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic . . .

"The fact that carriers are instruments of intrastate commerce, as well as of interstate commerce, does not derogate from the complete and paramount authority of Congress over the latter or preclude the Federal power from being exerted to prevent the intrastate operations of such carriers from being made a means of injury to that which has been confided to Federal care. Wherever the interstate and intrastate transactions of carriers are so related that the government of the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."

In *Northern Pacific Railway* v. *Washington*, 222 U.S. 370, in holding that the provisions of the Federal Hours

of Service Act, regulating the hours of labor of railway employees engaged in interstate commerce, applied to employees on a train hauling freight from a point outside the State to a point within the State, although it also carried local freight, and that State laws upon the subject could have no application, the Court say, at page 375:

> "In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."

In *Baltimore & Ohio R.R.* v. *Interstate Commerce Commission,* 221 U.S. 612, *supra,* in holding that the above statute was not unconstitutional because, in view of the nature of the road's business, it applied to employees engaged in intrastate commerce, the Court say, at page 618:

> "But the argument, undoubtedly, involves the consideration that the interstate and intrastate operations of interstate carriers are so interwoven that it is utterly impracticable for them to divide their employés in such manner that the duties of those who are engaged in connection with interstate commerce shall be confined to that commerce exclusively. And thus, many employés who have to do with the movement of trains in interstate transportation are, by virtue of practical necessity, also employed in intrastate transportation.
>
> "This consideration, however, lends no support to the contention that the statute is invalid. For there cannot be denied to Congress the effective exercise of its constitutional authority. By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them."

At page 619:

> "If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employés engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

In *Southern Railway Co.* v. *United States*, 222 U.S. 20, *supra*, in holding that the federal Safety Appliance Acts applied to all cars used on highways of interstate commerce, and in such application was within the power of Congress under the Commerce Clause, the Court say, at page 27:

> ". . ., it is no objection to such an exertion of this power that the dangers intended to be avoided arise, in whole or in part, out of matters connected with intrastate commerce.
>
> "Speaking only of railroads which are highways of both interstate and intrastate commerce, these things are of common knowledge: Both classes of traffic are at times carried in the same car and when this is not the case the cars in which they are carried are frequently commingled in the same train and in the switching and other movements at terminals. Cars are seldom set apart for exclusive use in moving either class of traffic, but generally are used interchangeably in moving both; and the situation is much the same with trainmen, switchmen and like employés, for they usually, if not necessarily, have to do with both classes of traffic."

Congress, by the Federal Employers' Liability Act (Appendix, p. 90), having asserted its paramount power over the subject of the liabilities of interstate carriers for injuries to their employees while engaged in interstate commerce, the right of the States to affect the subject-matter is excluded.

Furnishing illustrations of the application of the foregoing principles are those decisions which hold that State laws cannot affect the rights and remedies of employees of such carriers for injuries received while employed in intrastate commerce, if the employment also affects interstate commerce.

Pedersen v. *Delaware, Lackawanna & Western R.R.*, 229 U.S. 146.
Erie Railroad Co. v. *Winfield*, 244 U.S. 170.
Southern Pacific Ry. Co. v. *Industrial Accident Commission*, 251 U.S. 259.

In *Pedersen* v. *Delaware, Lackawanna & Western R.R.*, 229 U.S. 146, *supra*, it was held that an employee engaged in the work of maintaining tracks, bridges, engines, or cars in proper condition during their use as instrumentalities of both interstate and intrastate commerce, being engaged in interstate commerce is entitled to sue under the Federal Employers' Liability Act, and the Court say, at page 152:

> "True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."

In *Erie Railroad Co.* v. *Winfield*, 244 U.S. 170, *supra*, it was held that recovery could not be had under a State compensation law where the employee was injured while leaving the yard after his day's work in switching both interstate and intrastate commerce.

The Court say, at page 173:

> "In leaving the carrier's yard at the close of his day's work the deceased was but discharging a duty of his employment. See *North Carolina R.R. Co.* v. *Zachary*, 232 U.S. 248, 260. Like his trip through the

yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purposes of no importance."

In *Southern Pacific Co.* v. *Industrial Accident Commission of California,* 251 U.S. 259, *supra,* an award of the State Industrial Commission under a workmen's compensation law against the railroad was reversed, where it appeared that the employee received a shock while engaged in work upon wires conducting a current which eventually moved cars in both interstate and intrastate traffic.

The Court say, at page 262:

"If such work was part of interstate commerce the Workmen's Compensation Act of the State is inapplicable and the judgment below must be reversed."

And at page 263:

"Generally, when applicability of the Federal Employers' Liability Act is uncertain, the character of the employment, in relation to commerce, may be adequately tested by inquiring whether, at the time of the injury, the employee was engaged in work so closely connected with interstate transportation as practically to be a part of it."

Recent decisions overruling certain prior cases in their definition of the term "commerce"—

Chicago & Northwestern Ry. Co. v. *Bolle,* decided Nov. 23, 1931, 76 L. ed. 90;

Chicago & Eastern Illinois R.R. Co. v. *Industrial Commission,* decided Jan. 4, 1932, 76 L. ed. 204—

do not, of course, affect this principle.

Moreover, the subject-matter of the rights, remedies, and liabilities of interstate carriers, for injuries received by employees even where their employment is exclusively in intrastate commerce, is not a matter as to which State laws have power to legislate in its entirety.

The so-called Safety Appliance Acts require carriers engaged in commerce to equip their cars and locomotives with various designated appliances designed to insure the safety of employees and passengers.

U.S.C. title 45, c. 1, secs. 1-7, incl.; Act March 2, 1893, c. 196, secs. 1, 2, 4, 5, 8 (Appendix, pp. 92-93, *infra*).

U.S.C. title 45, c. 1, secs. 8, 9; Act March 2, 1903, c. 976, secs. 1, 2 (Appendix, p. 94, *infra*).

U.S.C. title 45, c. 1, secs. 11-14, 16; Act April 14, 1910, c. 160, secs. 1, 2, 3, 4, 5 (Appendix, pp. 95-96, *infra*).

U.S.C. title 45, c. 1, sec. 17; Act May 30, 1908, c. 225, secs. 1, 2 (Appendix, p. 97, *infra*).

U.S.C. title 45, c. 1, sec. 23; Act June 7, 1924, c. 355, sec. 2 (Appendix, p. 97, *infra*).

By these enactments the entire subject-matter of the carrier's liability to employees by reason of injuries sustained by them because of disregard of the regulations contained therein, including injuries received by employees engaged exclusively in intrastate commerce, is taken over by Congress, the implication of any authority to the States to deal with the subject-matter is excluded, and all State legislation with respect thereto is in violation of the Commerce Clause and invalid.

Recognition of the foregoing principles and their bearing is found in the following provisions of the New York Compensation Law:

Consolidated Laws of New York, chapter 67, as amended by chapter 615 of the Laws of 1922:

"§ 113. The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

Texas & Pacific Ry. Co. v. *Rigsby,* 241 U.S. 33.
San Antonio & Aransas Pass Ry. Co. v. *Wagner,* 241 U.S. 476.

In *Texas & Pacific Ry. Co.* v. *Rigsby,* 241 U.S. 33, *supra,* it was held in part, as stated in the headnote:

> "An employee of a railroad company has a right of action against the company for damages sustained by reason of defective appliances in violation of the Safety Appliance Act even though he was engaged at the time in intrastate, and not interstate, commerce."

The Court say, at page 41:

> "Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded."

The bearing of the Safety Appliance Acts was not dealt with by the State Supreme Court, but the defendant contends that the bearing of these acts is open to argument and consideration by reason of the rulings that the Act is not in conflict with the Commerce Clause, because, as is argued *supra,* page 16 *et seq.,* the right of the State to act in any field within the power of Congress thereunder depends upon the implication of authority from Congress. The defendant submits its argument in this connection only in case the Court considers it open.

It follows from the principles which we have been considering that State laws cannot consistently with the Commerce Clause, by regulation of the rights of employees engaged in intrastate commerce, affect interstate commerce or the rights and remedies of employees engaged therein and the corresponding liabilities and obligations of the railroads.

Furthermore, they are even powerless to affect the rights and remedies, in certain fields, of employees engaged exclusively in intrastate commerce.

But the State Supreme Court decided and ruled, without qualification, that the Act applies to the defendant as to its employees while employed in intrastate commerce, requires it to insure its employees to the extent that they are employed in intrastate commerce, and to pay premiums based upon that part of its payroll rightly allocated to intrastate commerce.

In case the defendant does not comply with these requirements the Act, by sections 66 and 67 (Appendix, pp. 85-86), takes away the common-law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant. The Act as so construed was by the State Court held not to burden interstate commerce or conflict with the Commerce Clause, and to be valid in its application to the defendant.

We here discuss the opinion and decision of the State Court in these connections:

Although the Court at the outset made a statement of principles which was correct in so far as it went, it did not apply those principles in its specific rulings and ultimate decision. This statement, with which it commenced its discussion, was as follows:

> "At the outset it is to be observed as the basis of this opinion that the act is in no way applicable to the interstate commerce of the defendant or its employees while engaged in that commerce. It was said in *Seaboard Air Line* v. *Horton,* 233 U.S. 492, at 501: 'it is settled that since Congress, by the act of 1908, took possession of the field of the employer's liability to employés in interstate transportation by rail, all state laws upon the subject are superseded. *Second Employers' Liability Cases,* 223 U.S. 1, 55.' That statement applies also to all State laws thereafter enacted; they are void in their application to the subject of interstate commerce, no matter how phrased" (Mass. Adv. Sheets, 1931, p. 1752; r. pp. 32, 33).

Thus the Court said in effect that, in view of the Federal Act, the State Act can have no valid application to the defendant's interstate commerce or to its employees while engaged therein.

The Court failed to apply these principles in its ultimate rulings and decision, but, as appears from the following portions of the opinion, measured the defendant's obligation to insure by the extent of its employees' services in intrastate commerce, and its obligation to pay premiums by the proportion of time spent therein, though recognizing to an extent the impossibility of classifying the employees between those engaged in interstate commerce and those engaged in intrastate commerce or of separating the two kinds of traffic, and held the Act as so construed to be valid.

In its discussion of the question of the application of the Act, having reached a conclusion that it was intended to be applicable to all classes of injuries "within the competency of the legislative department" (Mass. Adv. Sheets, 1931, p. 1754; r. p. 34), it ruled, as to the extent of that jurisdiction, as follows:

> "The jurisprudence of the State is supreme and exclusive over personal injuries received by railroad employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1754; r. p. 35)—

thus including within the power of the State jurisdiction of all injuries to employees while engaged in intrastate commerce, regardless of the relation of that commerce or such employment to interstate commerce or employment, and plainly covering cases of injury received by employees while performing both interstate and intrastate service, and making the State and not the Nation supreme wherever the services of the injured employee affect both classes of traffic.

This principle was applied in its rulings and decision upon the application of the Act to the defendant, the Court ruling, without qualification:

". . . the act is applicable to the defendant as to its employees while engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1758; r. p. 38).

Thereafter, after stating the defendant's contention—

"that thus interpreted the Act is unconstitutional as applied to the defendant, in that it imposes an undue burden upon interstate commerce contrary to art. I, sec. 8, of the Constitution of the United States" (Mass. Adv. Sheets, 1931, p. 1758; r. p. 38)—

it ruled:

"The provisions of G.L. c. 152, as herein interpreted, do not in our opinion burden the interstate commerce of the defendant" (Mass. Adv. Sheets, 1931, p. 1759; r. p. 39);

and thereafter, dealing further wth the construction of the Act and its constitutionality under the Commerce Clause, it ruled as follows:

"If the defendant insures in conformity to the provisions of the act, it need not insure its employees so far as engaged in interstate commerce. It can gain whatever advantages arise from accepting the act by confining its insurance strictly to its employees to the extent they are engaged in intrastate commerce. The defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on the part of its payroll rightly allocated to intrastate commerce. The rule of the commissioner of insurance requires that 'Compensation Insurance policies shall not be written except upon the basis of the entire payroll of the assured which is the subject of Insurance.' As applied to the defendant this rule means only its payroll of those of its employees engaged in intrastate commerce in Massachusetts and those, if any, entitled to the benefits of St. 1927, c. 309, §§ 2, 3. That is the only payroll

> of its employees subject to insurance. Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce. Such premiums would not be a burden upon interstate commerce. If such insurance would have any effect on interstate commerce, it would be purely incidental and therefore would infringe upon no constitutional inhibitions" (Mass. Adv. Sheets, 1931, p. 1760; r. p. 40).

The statement in the first sentence of the quoted passage, that the defendant "need not insure its employees to the extent that they are engaged in interstate commerce," means only that it need not insure the interstate aspects of its employees' service as such. It does not purport to limit the defendant's obligation to insure its employees to the extent that they are employed in intrastate commerce, including those whose employment by the same acts affects interstate commerce, and it is followed by the statement that the defendant can gain all advantages arising from the Act by "confining its insurance strictly to its employees to the extent that they are engaged in intrastate commerce;" that "the defendant, therefore, would be required to pay premiums based not on its entire payroll, but only on that part of its payroll rightly allocated to intrastate commerce," and that "this may be ascertained by determining the number of hours of employees spent in intrastate commerce."

The Court further indicated the requirement of insurance to the full extent of employment in intrastate commerce by the following reference to the possibility of separating the two kinds of traffic and classifying the employees, and by its statement that a reasonably accurate estimate of the time spent in each is sufficient:

> "It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to in-

dicate that reasonably accurate estimates of the proportion of time of employees spent in intrastate and interstate commerce cannot be made" (Mass. Adv. Sheets, 1931, p. 1757; r. p. 37).

The Act as construed, therefore, applies to the defendant to the extent that its employees are employed in intrastate commerce, without excepting those also employed in interstate commerce, and requires the defendant to insure them to the extent that they are employed in intrastate commerce, without excepting such employment also affecting interstate commerce, and to pay premiums based on their time spent in intrastate commerce, without excepting such of that time as is also spent in interstate commerce.

(a) *The Act is invalid because it affects interstate commerce in fields occupied by Congress and from which the power of the states to legislate is excluded.*

This follows from the occupancy by Congress by the Federal Employers' Liability Act of the field of legislation affecting injuries received by employees of railroads while employed in interstate commerce, the relation between the interstate and intrastate commerce of the railroads and the services of their employees therein, and the paramount nature of the power of Congress over intrastate commerce where incidental to its authority over interstate commerce.

See authorities, pages 27-35, *supra*.

The services of a carrier's employees, as a matter of common knowledge, are largely indivisible as between the two classes of commerce. To that extent whatever affects the rights and remedies of employees engaged in intrastate commerce affects interstate commerce and the rights of employees engaged therein and the corresponding rights, liabilities, and obligations of the railroad.

The application of the Act to the defendant as to its employees while employed in intrastate commerce, the require-

ment of insurance of those employees to the extent that they are engaged in intrastate commerce, and the payment of premiums based upon that part of the defendant's payroll rightly allocated to intrastate commerce, obviously cannot be met without affecting interstate commerce and insuring employees with respect to injuries received while engaged therein.

To the extent that a railroad's employees engaged in intrastate commerce are also engaged in interstate commerce, the authority of the Federal Employers' Liability Act is exclusive and State legislation is invalid.

See authorities, pages 33-35, *supra.*

Otherwise the laws of the States would be supreme within the national field.

Houston & Texas Railway v. *United States*, 234 U.S. 342, 351.

And the State by the Act in question would be enabled to a great extent to withdraw, from the operation of the Federal Act and the jurisdiction of Congress, authority over rights and remedies of employees injured while employed in interstate commerce and to bring the subject-matter within the State's system of workmen's compensation.

The State Court failed to give effect to the exclusive nature of the power of Congress under the Commerce Clause, and to the relation of the two kinds of traffic, one to another, and the services of a carrier's employees therein.

It likewise in great measure treated the case as though the question involved was the possibility of determining whether a particular injury arises out of intrastate or interstate traffic.

In discussing the bearing of the two classes of traffic upon the questions involved, the Court say:

"It is often a question of difficulty whether a particular injury arose out of intrastate or interstate com-

merce. That difficulty exists quite apart from the act and is not enhanced by its provisions. It is inherent in the complexities of the business of conducting a railroad in different States and transacting both intrastate and interstate business. There are differences in certain instances as to the persons entitled to recovery and the persons to whom the amount recovered may ultimately be payable under the Federal Employers' Liability Act and under the workmen's compensation act. These and other differences appear to us to constitute merely difficulties of a kind not infrequently [fol. 40] encountered in the practical administration of affairs, but not to amount to insurmountable obstacles in the way of construing the scope of the statute according to its words and purpose" (Mass. Adv. Sheets, 1931, p. 1756; r. p. 37).

The Court thus, to an extent, recognizes difficulties in the determination in a given case as to whether an injury arises out of intrastate or interstate commerce, and holds such difficulties not insurmountable.

But this of course is entirely beside the point. The question is not the usual one (of necessity involved in every case of injury to an employee of a railroad), whether in a given instance the employee was or was not employed in interstate commerce, as determinative of whether recovery is under a State law or the Federal Act.

In such cases the question, though of course sometimes difficult, is always possible of determination.

The question involved here is as to the validity of a requirement that a carrier insure its employees to the extent that they are employed in intrastate commerce, in the light of the interrelation of the two classes of commerce and the services of its employees as to each, and in the light of the paramount authority of Congress, whose exclusive jurisdiction cannot be affected by State laws. It is not solved by

the possibility of determining in case of injury whether the Federal or State law is controlling.

The Court also say, in the same connection:

> "The same employees may be engaged alternately during stated periods in intrastate and in interstate commerce. It may not be possible for the defendant to make a rigid classification of its employees between those engaged in intrastate and those engaged in interstate commerce, or to separate the two kinds of traffic. That is not required. There is nothing in the record to indicate that reasonably accurate estimates of the proportion of time of employees spent in intrastate and interstate commerce cannot be made. The contrary cannot be assumed in the absence of proof. It may be troublesome for the defendant to establish a basis for the insurance of the portion of its employees engaged in intrastate commerce" (Mass. Adv. Sheets, 1931, p. 1757; r. p. 37).

Here again the Court assumes a possibility of estimating the proportion of the time of employees spent in intrastate commerce as a "basis for the insurance of the portion of its employees engaged in intrastate commerce," and fails to take into consideration either the fact that a great part of that time is also spent in interstate commerce or the bearing and effect thereof.

Moreover, the field of legislation, with respect to injuries sustained by employees by reason of violations by railroads of the federal Safety Appliance Acts (Appendix, p. 92), is exclusively occupied by Congress to the exclusion of the States, irrespective of the nature of the traffic in which the employee is engaged.

See authorities, pages 35-37, *supra*.

The requirements of the State Act plainly cover this entire field.

(*b*) *The insurance requirements of the Act burden interstate commerce.*

The carrier is required to pay premiums based on that part of its payroll rightly allocated to intrastate commerce (Opinion Supreme Court, Mass. Adv. Sheets, 1931, p. 1760; r. p. 40).

These premiums are, of course, in consideration of the insurance of its employees, to the extent that they are employed in intrastate commerce.

It is the scheme of the Act that the employer receives the consideration for his premium by the transformation of his former liability under the law to the liability of the insurance company to pay compensation to an insured employee under section 26 (Appendix, p. 76), and by the operation of section 25 (Appendix, p. 75) to give the employer a right over against the insurer in event of recovery against the employer by an employee who does not come in under the insurance scheme of the Act.

But to a great extent employees engaged in intrastate commerce are also engaged in interstate commerce, and neither the injury nor the liability therefor can be divided or allocated as between the two kinds of traffic.

If an employee is injured while engaged in employment affecting both intrastate and interstate commerce, or is injured by reason of the carrier's violation of the Safety Appliance Act, he is entitled to recover of the carrier under the appropriate Federal Act regardless of the provisions of the State Act or any insurance effected under its terms.

This right of action under the Federal Act is, of course, not affected, not could it be, by the provisions of section 24 (Appendix, p. 75, *infra*), to the effect that if an employee of an insured person does not give his employer written notice that he claims such right he "shall be held to have

waived his right of action at *common law*, or under the law of any other jurisdiction in respect to an injury *therein* occurring." (Italics ours.)

See *McDonnell* v. *Berkshire St. Ry.*, 243 Mass. 94—

holding that before the amendment of section 24, adding the phrase "or under the law of any other jurisdiction in respect to an injury therein occurring," statutory rights of action could not be reserved.

McLaughlin's Case, Mass. Adv. Sheets, 1931, p. 243—

indicating that the above phrase had reference to a right of action for an injury occurring outside the State and refers to territorial jurisdiction.

The carrier, therefore, although it has paid a premium for insurance against injury to its employees to the extent that they are employed in intrastate commerce, is getting no protection where its employees employed in intrastate commerce are also employed in interstate commerce at the time of injury and where, irrespective of such employment, they are injured through violation of the Safety Appliance Acts, because in such cases it is liable to action under the Federal Acts.

It is true that it is provided by section 25 (Appendix, p. 75) that—

> "if an insured person . . . is required by a judgment of a court to pay to an employee any damages on account of personal injury sustained by such employee during the period covered by insurance, the insurer shall pay to the insured the full amount of such judgment and the cost assessed therewith if the insured shall have given the insurer written notice of the bringing of the action in which the judgment was recovered and an opportunity to appear and defend the same."

But this provision manifestly does not apply to judgments in actions under the Federal Act. It was obviously intended to apply only to judgments upon rights of action which are waived if not reserved under section 24, namely, "rights of action at common law or under the law of any other jurisdiction in respect of an injury *therein* occurring" (italics ours), and to afford protection to the employer in case the employee insisted on those rights.

But even if the provision could be held applicable to a judgment under the Federal Act, a right of action against an insurance company, and that conditional upon compliance with the requirements as to notice, is by no means the equivalent of exemption from liability to the employee, which of course the State law is powerless to afford where the employee is engaged in interstate commerce.

The premiums required of the carrier being paid out of its general funds, and being based upon the extent of the employment of its employees in intrastate commerce, and being in consideration of relief from liability for injuries received therein, and the carrier, by reason of the supremacy of the Federal Act, getting no protection in great part from liability for such injuries, the requirement of such premiums constitutes a discrimination against and a burden upon interstate commerce in violation of the Commerce Clause.

An equally fundamental ground of invalidity of the insurance provisions of the Act rests upon the defendant's right not to have its interstate commerce burdened by the State's measure and allocation of the burden to be placed upon each class of commerce.

This reason is applicable even had the Act required the insurance of employees only to the extent of their employment in intrastate commerce exclusively, and not affecting interstate commerce.

Under the Commerce Clause and the Federal Act the burden properly referable to interstate commerce is the

burden arising from injuries to employees while engaged therein, and the burden properly referable to intrastate commerce is the burden arising from injuries to employees while engaged outside of interstate commerce.

The defendant is entitled to have these burdens fall where they are placed by the Commerce Clause and the Federal Act, and to have the allocation of its burden, as between the two classes of traffic, determined and measured in accordance with these principles, and therefore by the actual event as it occurs.

The State is manifestly powerless to affect this right by legislation which measures the burden to be allocated to each kind of commerce in acordance with artificial and arbitrary rules, not in accordance with these principles.

Fargo v. *Hart*, 193 U.S. 490, 502.
Wallace v. *Hines*, 253 U.S. 66, 69.
Union Tank Line Co. v. *Wright*, 249 U.S. 275.

In *Union Tank Line Co.* v. *Wright, supra*, the State of Georgia assessed a foreign corporation, owning tank cars which were rented by shippers, for those running in and out of Georgia, without regard to and in excess of their real value in an amount bearing the same ratio to the value of all the corporation's personal property as the miles of railroad over which the cars were run in Georgia bore to the total miles over which all the cars were run there and elsewhere.

In holding that, this rule having no necessary relation to the value of the cars in Georgia, the tax was void under the Commerce Clause and the Fourteenth Amendment, the Court say, at page 283:

> "We think plaintiff in error's property was appraised according to an arbitrary method which produced results wholly unreasonable and that to permit enforcement of the proposed tax would deprive it of property without due process of law and also unduly burden interstate commerce."

And at page 286:

> ". . . Taxes must follow realities, not mere deductions from inadequate or irrelevant data."

The Act as construed attempts to accomplish this, however, by providing in effect that that part of the defendant's burden referable to injuries received in intrastate commerce shall be determined, not in accordance with these principles, but by premiums, the amount of which is measured according to a proportion of time spent by employees in intrastate commerce.

The State thus allocates the burdens referable to the two classes of commerce, not as they properly rest under the Commerce Clause and the Federal Act, but by an arbitrary rule established by it which disregards the actual event of the injury, which alone provides the lawful test.

The requirement of payment is not made dependent in fact upon a state of affairs affording the State authority to impose it.

Alpha Cement Co. v. *Massachusetts*, 263 U.S. 203, 219.

A result of the application of the principle established by the Act is shown by an extreme illustration, in which it is supposed that all injuries during the life of a policy should chance to occur in interstate commerce, whereby the defendant would be subject to the burden of liability under the Federal Act and also to the payment of the premium, for which it would receive no return.

Inasmuch as the premiums are paid out of the general funds of the defendant, are in addition to any burden and expense rightly referable to interstate commerce, and are not limited to or measured by any burden properly allocated to intrastate commerce in accordance with principles of allocation valid under the Commerce Clause and the Federal Act, they constitute a burden upon interstate commerce.

The principle involved in the foregoing is quite distinguishable from the ordinary case of recovery under State laws where the employee is not engaged in interstate commerce and the burden necessarily lies where it falls, in accordance with the nature of the traffic in which the employee is in fact engaged at the time of injury.

Moreover, it is manifestly impossible to determine the extent to which a railroad's employees are engaged in intrastate commerce, or the part of its payroll rightly allocated to intrastate commerce, or the number of hours spent in intrastate commerce as required by the Act in the determination of the basis for the payment of premiums (Mass. Adv. Sheets, 1931, p. 1760; r. p. 40).

The extent of the operation of each employee upon each class of traffic must be determined in order that that part of the payroll rightly allocated to intrastate commerce may be ascertained.

The services of train crews daily affect trains consisting of both interstate and intrastate cars. Trains consist of cars carrying both interstate and intrastate freight and passengers. Maintenance of tracks and other instrumentalities and switching operations affect both classes of traffic to an extent impossible to allocate as between the two.

Services of various employees drawing different salaries or wages affect the same items or aspects of traffic in different connections, and services of a given employee may affect a great many items of traffic of each kind.

These are but illustrations, of course, of considerations too numerous to specify or call to mind.

It is under these considerations and conditions that that part of the carrier's payroll rightly allocated to intrastate commerce must be ascertained, in order that the carrier may not pay premiums based in part upon the interstate services of its employees. The Court states that, "Seemingly it may be ascertained by determining the number of hours of employees spent in intrastate commerce" (Mass. Adv.

Sheets, 1931, p. 1760; r. p. 40). But a large portion of the number of hours spent in intrastate commerce is also spent in interstate commerce and the proportion to which such employment affects each must be determined as to each employee.

Had the Act as construed merely required the defendant to insure its employees to the extent that they are employed in intrastate commerce exclusively and unrelated to interstate commerce, the same considerations would have been presented.

The necessity would then have been to determine the proportion of service of each employee affecting intrastate commerce and not also affecting interstate commerce, and the time spent in such service.

In other words, the services affecting intrastate commerce only must be segregated from the services affecting interstate commerce only, and from those affecting both.

It is clear, therefore, that the allocations, indicated by the State Court as sufficient for the protection from burden of the defendant's interstate commerce, are impossible, and interstate commerce is burdened by the imposition of the requirements thereby involved.

In view of the nature of the services of the employees of an interstate railroad, decisions which recognize the possibility of allocating as between the two classes of traffic the value of property used in each and the revenues thereof—

Smith v. *Illinois Bell Tel. Co.*, 282 U.S. 133—

are distinguishable.

3.

The provisions of Massachusetts General Laws, c. 152, relative to insurance of employees, being unconstitutional and invalid as applied to the defendant, sections 66 and 67 thereof, in effect providing that in case of failure of an employer to insure its employees in accordance with its provisions, such employer is not entitled to the benefit of the

common-law defenses of contributory negligence, assumption of risk, and negligence of a fellow servant are unconstitutional and invalid as applied to the defendant, and those defenses were open to the defendant at the trial.

These sections are as follows:

"Section 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence—

"1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury,

"Section 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person" (Appendix, pp. 85-86).

It is apparent that the insurance provisions are a vital and integral part of the general plan of the Act, which was to establish a comprehensive system the purpose of which is to govern the rights and liabilities of employers and employees by means of insurance, in place of the former method whereby their rights and liabilities were left to be determined by the common law as modified by the Employers' Liability Act, Massachusetts General Laws, c. 153; c. 229 (Appendix, pp. 86-89).

By sections 66 and 67 failure to so insure is in effect penalized by the withdrawal of the defenses of assumption of risk, contributory negligence, and negligence of a fellow servant.

The Act was first enacted by Massachusetts Acts 1911, c. 751, entitled "An Act relative to payments to employees for

personal injuries received in the course of their employment and to the prevention of such injuries."

It now comprises the Act under consideration, chapter 152 of the Massachusetts General Laws (the 1920 consolidation of the general statutes of the State), entitled "Workmen's Compensation."

The law as first enacted by the Acts of 1911 was the same in its general scheme and features (with certain differences here immaterial) as is now contained in chapter 152, although the form and arrangement was quite different.

By Part IV of the Act of 1911 a corporation, entitled "The Massachusetts Employees' Insurance Association," was created, and by section 6 of Part IV it was provided that any employer in the Commonwealth might become a subscriber.

These subscribers were, by section 13, required to pay annually "such premiums as may be required to pay the compensation herein provided for the injuries which may occur in that year."

By Part II, sec. 1, employees of subscribers were entitled to be paid their compensation from this association.

> "Section 1. If an employee who has not given notice of his claim of common law rights of action, as provided in Part I, section five, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, he shall be paid compensation by the association, as hereinafter provided, if his employer is a subscriber at the time of the injury."

But it was also provided by Part V, sec. 3:

> "Section 3. Any liability insurance company authorized to do business within this commonwealth shall have the same right as the association to insure the liability to pay the compensation provided for by this act, and a policy holder of such liability company shall be re-

garded as a subscriber so far as applicable within the meaning of this act, and when any such company insures such payment of compensation it shall be subject to all the regulations and obligations imposed upon the association."

Sections 66 and 67 of General Laws, c. 152, appeared as sections 1, 2, and 3, respectively, of Part I of chapter 751 of the 1911 Act as follows:

"Section 1. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense:

"1. That the employee was negligent;

"2. That the injury was caused by the negligence of a fellow employee;

"3. That the employee had assumed the risk of the injury.

"Section 2. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers.

"Section 3. The provisions of section one shall not apply to actions to recover damages for personal injuries sustained by employees of a subscriber."

The provisions of section 68 of chapter 152, excluding from the benefits of the State Employers' Liability Act employees of insured persons who claim their rights of action at common law, appear as section 4.

"Section 4. The provisions of sections one hundred and twenty-seven to one hundred and thirty-five, inclusive, and of one hundred and forty-one to one hundred and forty-three, inclusive, of chapter five hundred and fourteen of the acts of the year nineteen hundred and nine, and of any acts in amendment thereof, shall not

apply to employees of a subscriber while this act is in effect."

Section 24 of chapter 152, relative to waiver by an employee of an insured person of his common-law rights, appears as section 5:

"Section 5. An employee of a subscriber shall be held to have waived his right of action at common law to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, notice in writing that he claimed such right, or if the contract of hire was made before the employer became a subscriber, if the employee shall not have given the said notice within thirty days of notice of such subscription. An employee who has given notice to his employer that he claimed his right of action at common law may waive such claim by a notice in writing which shall take effect five days after it is delivered to the employer or his agent."

The provisions of sections 66 and 67 of the Act taking away the common-law defenses referred to from employers who do not insure, and the provisions of section 68, taking away from the employees of an insured person who claim their common-law rights the benefits of the State Employers' Liability Act, which to a certain extent modified the common-law defenses, were first enacted as the above-quoted sections 1, 2, 3, and 4 of the 1911 Act.

Previous to that enactment the rights of employees against employers depended upon the common law and the provisions of the State Employers' Liability Act, which afforded the employee greater rights in certain defined instances.

See Massachusetts Acts 1909, c. 514, secs. 127-135, inclusive, and secs. 141-143, inclusive, now Mass. General Laws, c. 153 (Appendix, p. 86) and c. 229, sec. 4 (Appendix, p. 89).

Sections 66, 67, and 68, inclusive (Appendix, pp. 85-86), clearly assume, as a reason for their enactment and presence, the operation and effectiveness of the insurance features of the Act.

It is apparent, therefore, that the insurance features of the Act are essential and vital parts of the plan of the statute; that the other portions of the statute would not have been passed without them, and that sections 66, 67, and 68 were enacted as part of the plan of the Act and for the purpose of giving effect to its scheme.

The insurance features of the Act, therefore, being invalid in their application to the defendant, section 66 is likewise invalid and of no effect.

Williams v. *Standard Oil Co.*, 278 U.S. 235.
Lemke v. *Farmers' Grain Co.*, 258 U.S. 50.
Pollock v. *Farmers' Loan & Trust Co.*, 158 U.S. 601.
Howard v. *Illinois Central R.R. Co.*, 207 U.S. 463.

In *Williams* v. *Standard Oil Co.*, 278 U.S. 235, *supra*, a statute of Tennessee contained provisions for the fixing of prices at which gasoline might be sold. It contained other provisions, such as the requiring of furnishing of information concerning manufacture, cost and other details, with requirement of a permit fee, etc.

The statute contained a provision that if any section or provision of the Act should be held invalid, this should not affect the validity of other sections or provisions. The Court held that the price-fixing provisions of the law were void, and in holding that the other provisions must fall with these, say, at page 241:

> ". . . the general rule is that the unobjectionable part of a statute cannot be held separable unless it appears that, 'standing alone, legal effect can be given to it and that the legislature intended the provision to

stand, in case others included in the act and held bad should fall.' "

. . . . . .

"In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety. This is well stated in *Riccio* v. *Hoboken,* 69 N.J. L. 649, 662, where the New Jersey Court of Errors and Appeals, in an opinion delivered by Judge Pitney (afterward a Justice of this Court), after setting forth the rule as above, said:

" 'In seeking the legislative intent, the presumption is against any mutilation of a statute, and the courts will resort to elimination only where an unconstitutional provision is interjected into a statute otherwise valid, and is so independent and separable that its removal will leave the constitutional features and purposes of the act substantially unaffected by the process.' "

In *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U.S. 601, *supra,* it was held that the Act of Congress imposing taxes on the income of real estate and personal property was unconstitutional as being a direct tax; that the provisions of the Act imposing taxes upon the income of professions, employments, and vocations, although not objectionable in and of itself, being a part of the general scheme of the Act, were likewise void. The Court say, at page 636:

"Or, as the point is put by Mr. Justice Matthews in *Poindexter* v. *Greenhow,* 114 U.S. 270, 304 [29: 185, 197]: 'It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the legislature was that

the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute, for the law intended by the legislature, one they may never have been willing by itself to enact.' ''

In *Howard* v. *Illinois Central R.R. Co.*, 207 U.S. 463, *supra,* in holding that the Federal Employers' Liability Act of June 11, 1906, which included within its terms employees not engaged in interstate commerce, being unconstitutional as to such employees, was invalid in its entirety, the Court say, at page 501:

> ''Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy.''

Furthermore, the Act contains no clause expressing a legislative intent that, in event of invalidity of parts, other parts shall remain unaffected, thus adding to the presumption that the Act must stand or fall as a whole.

Furthermore, the effect of sections 66 and 67 is to make the defendant's exemption from the withdrawal of the common-law defenses conditional upon compliance with the unconstitutional insurance aspects of the Act.

A State cannot impose compliance with an unconstitutional law or the relinquishment of a constitutional right as a condition of the granting of a right or exemption from a burden, although the right or burden be of such nature as the State might withhold or impose unconditionally.

Western Union Tel. Co. v. *Kansas,* 216 U.S. 1.

Pullman Co. v. *Kansas*, 216 U.S. 56.
Frost Trucking Co. v. *Railroad Commission*, 271 U.S. 583.

In *Western Union Telegraph Co.* v. *Kansas*, 216 U.S. 1, *supra*, it was held that the state could not require the Telegraph Company, which was engaged in interstate business, as a condition of its right to do domestic business in the State, to pay a fee based upon the amount of its capital stock representing its property throughout the United States and foreign countries, and that the State could not oust the company from its purely domestic business therein for non-compliance with the condition.

In *Pullman Co.* v. *Kansas*, 216 U.S. 56, *supra*, in which the same question was presented under the same statute, the Court stated its decision in part as follows, at page 63:

> "That a decree ousting and prohibiting the company from doing intrastate business in Kansas was improperly granted, the aid of the court should have been refused and the bill dismissed, because a decree such as the State asked would, in effect, have recognized the validity of a condition which the State could not constitutionally prescribe under the guise of a fee for permission to do intrastate business."

In *Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, *supra*, it was held, as stated in the headnote:

> "Assuming that the use of its highways by private carriers for hire is a privilege which the State may deny, it can not constitutionally affix to that privilege the unconstitutional condition precedent that the carrier shall assume against his will the burdens and duties of a common carrier."

Therefore the statement of the State Court (Mass. Adv. Sheets, 1931, p. 1759; r. p. 39) that—

> "Whether the defendant shall avail itself of that act is wholly optional with it. If it does not insure in accordance with its provisions, it cannot, in common with all other employers in like situation, interpose the defences of assumption of risk, contributing negligence, or the fellow servant doctrine in actions for personal injury brought against it by its employees engaged in intrastate commerce"—

and the reasons given therefor, that the Legislature may change the common-law defenses as it sees fit, have no bearing upon the present case in view of the relation of section 66 to the Act as a whole and the invalidity of the conditions imposed in connection with its operation.

The Court stated, at the conclusion of its opinion:

> "The essential points of the case at bar, so far as they relate to interstate commerce, seem to us to be concluded against the contention of the defendant by the decisions in *New York Central Railroad* v. *White*, 243 U.S. 188, and *Hawkins* v. *Bleakly*, id. 210" (Mass. Adv. Sheets, 1931, p. 1761; r. p. 41).

But the questions herein presented were not raised in the cases referred to.

In *Hawkins* v. *Bleakly* it was held not to be violative of due process for a State to withdraw the common-law defenses from employers who voluntarily reject the compensation system there involved.

No question of the validity of that system under the Commerce Clause was involved, and no question was involved of the effect of invalid conditions in connection with the withdrawal of the common-law defenses.

In *New York Central Railroad Co.* v. *White*, the validity of an award under the New York Compensation Law was involved. The questions involved are stated, at

page 191, to be whether the liability of the company, in view of the employee's employment at the time of injury, was defined and limited by the provisions of the Federal Employers' Liability Act, and whether the award was in violation of the due process and equal protection clauses of the Fourteenth Amendment.

As to the first point, it was held that the employee was not engaged in interstate commerce, and that therefore the Federal Act had no application. No question was presented or considered as to the constitutionality under the Commerce Clause of an Act construed as the one here under consideration and the conditions imposed thereby in connection with the withdrawal of common-law defenses.

Assuming, therefore, that the State had a right to withdraw the common-law defenses in cases of purely intrastate injury, it could not make exemption from withdrawal conditional upon compliance with the unconstitutional and invalid insurance requirements of the Act.

Section 66 of the Act, therefore, being invalid, it follows that the defense of negligence of a fellow servant was open to the defendant at the trial, and, upon the finding and ruling of the trial Court that the plaintiff's injuries were caused by the negligence of a fellow servant (r. p. 26), the defendant was entitled to judgment in its favor.

The judgment of the Municipal Court of the City of Boston in favor of the respondent herein, the plaintiff below, should therefore be reversed, and judgment entered in favor of the petitioner, the defendant below.

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(Insertion ~~before first paragraph~~, page 62, as indicated)

The act there under consideration contained the following provisions:

Consolidated Laws of New York, chapter 67, as amended by chapter 41 of the Laws of 1914:

"§ 114. The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like manner and with the same effect in all respects as provided herein for other employers and their employees."

17. Decision of department, etc., not suspended by appeal.
18. Independent contractor, etc.
19. Notice of injuries to be given to department.
20. Hospital records admissible as evidence.
21. Notice to employees.
22. Same subject.
23. Acceptance of payment, etc., by employee releases employer from liability, etc.
24. Notice by employee to retain rights at common law.
25. Payment of judgment by insured.

APPENDIX.

State Laws.

Workmen's Compensation

General Laws, Chapter 152

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2. Powers and duties of department.
3. Duties of division of industrial training.
4. Annual report.

PROCEDURE.

5. Rules, process, witnesses.
6. Agreement for compensation.
7. Hearing by one member.
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10. Hearing by reviewing board.
11. Powers of superior court.
12. Weekly payments may be changed.
13. Fees of physicians, etc.
14. Frivolous proceedings. Costs.
15. Legal liability for injuries. Election, etc.
16. Decision of department. Enforcement.
17. Decision of department, etc., not suspended by appeal.
18. Independent contractor, etc.
19. Notice of injuries to be given to department.
20. Hospital records admissible as evidence.
21. Notice to employees.
22. Same subject.
23. Acceptance of payment, etc., by employee releases employer from liability, etc.
24. Notice by employee to retain rights at common law.
25. Payment of judgment by insured.

PAYMENTS.

26. Payments.
27. Misconduct by employee bars compensation.
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29. Waiting period.
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32. Dependents.
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55. Approval by commissioner of insurance.
56. Joint and several policies.
57. Deposit by company of value of outstanding claims.
58. Commissioner to compute value.

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60. Penalty for failure to make deposit.
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63. Information by insurance companies on request of the department.
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66. Modification of liability.
67. Application of the preceding section.
68. Application of certain other laws.
69. Compensation by the commonwealth, etc.
70. Procedure.
71. Other remedies excluded.
72. Waiver of rights by employee.
73. Election between compensation and pension.
74. Application of sections 69 to 75.
75. Agents for enforcing sections 69 to 74.

SECTION 1. The following words as used in this chapter shall, unless a different meaning is plainly required by the context or specifically prescribed, have the following meanings:

(1) "Average weekly wages", the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, re-

gard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district.

(2) "Department", the department of industrial accidents.

(3) "Dependents", members of the employee's family or next of kin who were wholly or partly dependent upon the earnings of the employee for support at the time of the injury.

(4) "Employee", every person in the service of another under any contract of hire, express or implied, oral or written, except masters of and seamen on vessels engaged in interstate or foreign commerce, and except one whose employment is not in the usual course of the trade, business, profession or occupation of his employer. Any reference to an employee who has been injured shall, when the employee is dead, also include his legal representatives, dependents and other persons to whom compensation may be payable.

(5) "Employer" includes the legal representative of a deceased employer.

(6) "Insured" or "insured person", an employer who has provided by insurance for the payment to his employees of the compensation required by this chapter.

(7) "Insurer", any insurance company which has insured the compensation payable by an employer under this chapter.

(8) "Reviewing board", the reviewing board designated under section three of chapter twenty-four.

SECTION 2. The department shall make all necessary inspections and investigations relating to causes of injuries for which compensation may be claimed, and for this purpose any member or employee thereof may at any time enter

places of employment when being used for business purposes. It shall also have the powers and duties set forth in this chapter.

SECTION 3. The division of industrial training shall aid persons whose earning capacity has been impaired by industrial accident while residents of the commonwealth in obtaining such education, training and employment as will tend to restore their earning capacity. It may co-operate with the United States government and in co-operation with the department of education may establish and maintain, or assist in so doing in schools or institutions supported wholly or in part by the commonwealth, such courses as it may deem expedient, and otherwise may act in such manner as it may deem necessary to accomplish the purpose of this section. (Repealed St. 1921, c. 462, § 8, and duties transferred to State Board for Vocational Training.)

SECTION 4. The department shall make an annual report.

PROCEDURE.

SECTION 5. The department may make rules consistent with this chapter for carrying out its provisions. Process and procedure shall be as simple and summary as reasonably may be. The department or any member thereof may subpoena witnesses, administer oaths, and examine such parts of the books and records of the parties to a proceeding as relate to questions in dispute. Upon the written request of the department or of any member thereof, together with interrogatories and cross-interrogatories, if any there be, filed with the clerk of the superior court for any county, commissions to take depositions of persons or witnesses residing without the commonwealth, or in foreign countries, or letters rogatory to a court in another state or to a court in a foreign country, shall forthwith issue from the said superior court, as in cases pending therein; and upon the return of the said depositions or answers to letters rogatory the same shall be opened by the clerk of the

court issuing the commissions or letters, and the said clerk shall endorse thereon the date when a deposition or answer to letters rogatory was received, and the same shall forthwith be delivered to the department. No entry fee shall be charged in such cases. The fee for attending as a witness before the department shall be one dollar and fifty cents a day; for attending before a member of the department, fifty cents a day; in both cases, five cents a mile for travel out and home. The superior court may enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records.

SECTION 6. If the insurer and the injured employee reach an agreement in regard to compensation, a memorandum thereof shall be filed with the department, and, if approved by it, the memorandum shall for all purposes be enforceable under section eleven. Such agreements shall be approved by said department only when the terms conform to this chapter.

SECTION 7. If the insurer and the injured employee fail to reach an agreement in regard to compensation, or if they have reached such an agreement, which has been signed and filed in accordance with this chapter, and compensation has been paid or is due in accordance therewith, and the parties thereto then disagree as to the continuance of any weekly payments under such agreement, either party may notify the department, which shall thereupon assign the case for hearing by a member thereof.

SECTION 8. Such member shall make such inquiries and investigations as shall be deemed necessary. The hearing shall be held in the town where the accident occurred or in such other place as the department may designate, and the decision of the member, together with a statement of the evidence, his findings of fact, rulings of law, and other matters pertinent to questions arising before him, shall be filed with the department. Unless a claim for review is

filed by either party within seven days, the decision shall be enforceable under section eleven.

SECTION 9. The department or any member thereof may appoint a duly qualified impartial physician to examine the injured employee and to report. The fee for this service shall be five dollars and traveling expenses, but the department may allow additional reasonable amounts in extraordinary cases, and the insurer shall reimburse the department for the amount so paid. The report of the physician shall be admissible as evidence in any proceeding before the department or a member thereof; provided, that the employee and the insurer have seasonably been furnished with copies thereof.

(a) Whenever a medical question is in dispute in any case, and an impartial physician has not, prior to seven days before the date assigned for hearing thereon, been appointed by the department or a member thereof, the employee may engage his own physician to appear and testify in his behalf and, if the decision of the single member or the department is in favor of the employee, a reasonable fee shall be allowed by the member or by the department for such physician's services and shall be added to the amount awarded to the employee and be paid by the insurer under the provisions of this chapter.

SECTION 10. If a claim for a review is filed under section eight, the reviewing board shall hear the parties, and may hear evidence in regard to pertinent matters and may revise the decision in whole or in part, or may refer the matter back to the member for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties.

SECTION 11. Any party in interest may present certified copies of an order or decision of the reviewing board, a decision of a member from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the department, and all

papers in connection therewith, to the superior court for the county in which the injury occurred or for the county of Suffolk, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact or where the decree is based upon a decision of a member or a memorandum of agreement, and except that there shall be no appeal from a decree based upon an order or decision of the reviewing board which has not been presented to the court within ten days after the notice of the filing thereof by said board. Upon the presentation to it of a certified copy of a decision ending, diminishing or increasing a weekly payment under the following section the court shall revoke or modify the decree to conform to such decision.

SECTION 12. Questions as to a weekly payment may be heard and decided by the reviewing board, or any member of the department, and the reviewing board or such member may, in accordance with the evidence and subject to this chapter, issue any order deemed advisable. If the case is heard and decided by a member, his decision may be reviewed under sections eight and ten.

When in any case before the board there appears of record a finding that the employee is entitled to compensation, no subsequent finding by the board or by a member thereof discontinuing compensation on the ground that the employee's incapacity has ceased shall be considered final as a matter of fact or res judicata as a matter of law, and such employee or his dependents, in the event of his death, may have further hearings as to whether his incapacity or death is or was the result of the injuries for which he received compensation; provided, that if the board shall determine that the petition for such a rehearing is without

merit and frivolous, the employee or his dependents shall not thereafter be entitled to file any subsequent petition therefor except for cause shown and in the discretion of the member to whom such subsequent petition may be referred, and that, in the event of the death of the employee, such a petition for a rehearing shall be filed within three months from the time of his decease and within one year from the date of the finding terminating his compensation.

SECTION 13. Fees of attorneys and physicians and charges of hospitals for services under this chapter shall be subject to the approval of the department. If the insurer and any physician or hospital, or the employee and any attorney, fail to agree as to the amount to be paid for such services, either party may notify the department, which may thereupon assign the case for hearing by a member thereof. The members shall report the facts to the department for decision, and decision shall be enforceable under section eleven.

SECTION 14. If the reviewing board, any member of the department or any court before which proceedings under this chapter are brought determines that such proceedings have been brought, prosecuted or defended without reasonable ground, the whole cost of the proceedings shall be assessed upon the party who has so brought, prosecuted or defended them.

SECTION 15. Where the injury for which compensation is payable was caused under circumstances creating a legal liability in some person other than the insurer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages or against the insurer for compensation under this chapter, but not against both. If compensation be paid under this chapter, the insurer may enforce, in the name of the employee or in its own name and for its own benefit, the liability of such other person; and in case the insurer recovers a sum greater than that paid by it to the employee, four fifths of the excess shall be paid to the employee; but

the insurer shall not make any settlement by agreement with such other person without the approval of the industrial accident board. An employee shall not be held to have exercised his option under this section to proceed at law if, at any time prior to trial of an action at law brought by him against such other person, he shall, after notice to the insurer, discontinue such action, provided that upon payment of compensation following such discontinuance the insurer shall not have lost its right to enforce the liability of such other person as hereinbefore provided.

SECTION 16. Questions arising under this chapter, if not settled by agreement by the parties interested therein, shall, except as otherwise provided in this chapter, be determined by the department. The decisions of the department shall for all purposes be enforceable under section eleven.

SECTION 17. Orders or decisions of the reviewing board or department, decrees of the superior court upon such orders, decisions of a member of the department from which no claim for review has been filed within the time allowed therefor, or memoranda of agreements approved by the department shall have effect, notwithstanding an appeal, until it is otherwise ordered by a justice of the supreme judicial court, who may in any county suspend or modify such decree, order or decision, during the pendency of the appeal.

SECTION 18. If an insured person enters into a contract, written or oral, with an independent contractor to do such person's work, or if such a contractor enters into a contract with a sub-contractor to do all or any part of the work comprised in such contract with the insured, and the insurer would, if such work were executed by employees immediately employed by the insured, be liable to pay compensation under this chapter to those employees, the insurer shall pay to such employees any compensation which would be payable to them under this chapter if the independent or sub-contractors were insured persons. The insurer, how-

ever, shall be entitled to recover indemnity from any other person who would have been liable to such employees independently of this section; and if the insurer has paid compensation under this section, it may enforce, in the name of the employee or in its own name and for its benefit, the liability of such other person. This section shall not apply to any contract of an independent or sub-contractor which is merely ancillary and incidental to, and is no part of or process in, the trade or business carried on by the insured, nor to any case where the injury occurred elsewhere than on, in or about the premises on which the contractor has undertaken to execute the work for the insured or which are under the control or management of the insured.

SECTION 19. Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment. Within forty-eight hours, not counting Sundays and legal holidays, after the occurrence of an injury, a written report thereof shall be made to the department on blanks to be procured from it. Upon the termination of the disability of the injured employee, the employer shall make a supplemental report upon blanks to be procured from it. If the disability extends beyond a period of sixty days, the employer shall report to the department at the end of such period that the injured employee is still disabled, and upon the termination of the disability shall file a final supplemental report as provided above.

The said reports shall contain the name and nature of the business of the employer, the situation of the establishment, the name, age, sex and occupation of the injured employee, and shall state the date and hour of any accident causing the injury, the nature and cause of the injury, and other information required by the department.

Employers refusing or neglecting to make the report required by this section shall be punished by a fine of not more than fifty dollars.

Copies of reports of injuries filed by employers with the department and statistics and data compiled therefrom shall be kept available by it, and shall be furnished on request to the department of labor and industries for its own use.

Within sixty days after the termination of the disability of the injured employee, the insurer shall file with the department a statement showing the total payments made or to be made for compensation and for medical services for such injured employee.

SECTION 20. Copies of hospital records kept in accordance with section seventy of chapter one hundred and eleven, certified by the persons in custody thereof to be true and complete, shall be admissible in evidence in proceedings before the department or any member thereof. The department or any member, before admitting any such copy in evidence may require the party offering the same to produce the original record. All medical records and reports of hospitals, clinics and physicians of the insurer or of the employee shall be open to the inspection of the department so far as relevant to any matter before it.

SECTION 21. Every insured person shall, as soon as he secures a policy, give written or printed notice to all persons under contract of hire with him that he has provided for payment to injured employees by the insurer.

SECTION 22. Every insured person shall give written or printed notice to every person with whom he is about to enter into a contract of hire that he has provided for payment to injured employees by the insurer. An employer ceasing to be insured shall, on or before the day on which his policy expires, give written or printed notice thereof to all persons under contract with him. In case of the renewal of the policy no notice shall be required. He shall file a copy of said notice with the department. The notices required by this and the preceding section may be given in the manner therein provided or in such other manner as may be approved by the department.

SECTION 23. If an employee of an insured person files any claim with or accepts payment from the insurer on account of personal injury, or makes any agreement, or submits to a hearing before a member of the department under section eight, such action shall constitute a release to the insured of all claims or demands at law, if any, arising from the injury.

SECTION 24. An employee of an insured person shall be held to have waived his right of action at common law or under the law of any other jurisdiction in respect to an injury therein occurring, to recover damages for personal injuries if he shall not have given his employer, at the time of his contract of hire, written notice that he claimed such right, or, if the contract of hire was made before the employer became an insured person, if the employee shall not have given the said notice within thirty days of notice of such insurance. An employee who has given notice to his employer that he claimed his right of action as aforesaid may waive such claim by a written notice, which shall take effect five days after it is delivered to the employer or his agent. The notices required by this section shall be given in such manner as the department may approve. An employee under a contract of hire with an insured person, made prior to the effective date of so much of this act as is not affected by section fourteen, shall be deemed to have waived his rights of action to recover damages for personal injuries under the law of any other jurisdiction in respect to injuries therein occurring if he shall not give his employer, within thirty days after said effective date, written notice that he claims such rights.

SECTION 25. If an insured person who has complied with the rules, regulations and demands of the insurer is required by a judgment of court to pay to an employee any damages on account of personal injury sustained by such employee during the period covered by insurance, the insurer shall pay to the insured the full amount of such judg-

ment and the cost assessed therewith if the insured shall have given the insurer written notice of the bringing of the action in which the judgment was recovered and an opportunity to appear and defend the same.

PAYMENTS.

SECTION 26. If an employee who has not given notice of his claim of common law rights of action, under section twenty-four, or who has given such notice and has waived the same, receives a personal injury arising out of and in the course of his employment, or arising out of an ordinary risk of the street while actually engaged, with his employer's authorization, in the business affairs or undertakings of his employer, and whether within or without the commonwealth, he shall be paid compensation by the insurer, as hereinafter provided, if his employer is an insured person at the time of the injury; provided, that as to an injury occurring without the commonwealth he has not given notice of his claim of rights of action under the laws of the jurisdiction wherein such injury occurs or has given such notice and has waived it.

SECTION 27. If the employee is injured by reason of his serious and wilful misconduct, he shall not receive compensation.

SECTION 28. If the employee is injured by reason of the serious and wilful misconduct of an insured person or of any person regularly intrusted with and exercising the powers of superintendence, the amounts of compensation hereinafter provided shall be doubled. In such case the insured shall repay to the insurer the extra compensation paid to the employee. If a claim is made under this section the insured may appear and defend against such claim only.

SECTION 29. No compensation shall be paid for any injury which does not incapacitate the employee for a period of at least seven days from earning full wages, but if in-

capacity extends beyond such period, compensation shall begin on the eighth day after the injury, and if incapacity extends beyond a period of four weeks, compensation shall be paid from the day of injury, but except under section thirty-five no compensation shall be paid for any period for which any wages were earned. When compensation shall have begun it shall not be discontinued except with the written assent of the employee or the approval of the department or a member thereof; provided, that such compensation shall be paid in accordance with section thirty-five if the employee in fact earns wages after the original agreement is filed.

SECTION 30. During the first two weeks after the injury, and, if the employee is not immediately incapacitated thereby from earning full wages, then, from the time of such incapacity, and in unusual cases, or cases requiring specialized or surgical treatment, in the discretion of the department, for a longer period, the insurer shall furnish adequate and reasonable medical and hospital services, and medicines if needed, together with the expenses necessarily incidental to such services. The employee may select a physician other than the one provided by the insurer, and in case he shall be treated by a physician of his own selection, or where, in case of emergency or for other justifiable cause, a physician other than the one provided by the insurer is called in to treat the injured employee, the reasonable cost of his services shall be paid by the insurer, subject to the approval of the department. Such approval shall be granted only if the department finds that the employee was so treated by such physician or that there was such emergency of justifiable cause, and in all cases that the services were adequate and reasonable and the charges reasonable.

SECTION 31. If death results from the injury, the insurer shall pay the following dependents of the employee wholly dependent upon his earnings for support at the time of his injury, compensation as follows:—to the widow, so long

as she remains unmarried, ten dollars a week if and so long as there is no child of the employee, who is under the age of eighteen, or over said age and physically or mentally incapacitated from earning; twelve dollars a week if and so long as there is one such child, and two dollars more a week for each such additional child; and if the widow dies, such amount as would have been payable had she lived shall be paid to the surviving children aforesaid in equal shares; but if such widow remarries, the aforesaid payments to her shall terminate and the insurer shall pay each week to each of such children, if and so long as there are more than five, his or her proportionate part of sixteen dollars, and shall pay to each of such children, if and so long as there are five or less, three dollars a week. The total amount of such payments shall not be more than sixty-four hundred dollars and said payments shall not continue more than four hundred weeks. When weekly payments have been made to an injured employee before his death, the compensation under the foregoing provisions of this section shall begin from the date of the last of such payments but shall not amount to a total of more than sixty-four hundred dollars, including such payments as were made to the injured employee before his death, and shall not continue for more than four hundred weeks from the date of the injury.

In all other cases of total dependency, the insurer shall pay the dependents of the employee wholly dependent upon his earnings for support at the time of injury a weekly payment equal to two-thirds of his average weekly wages, but not more than ten dollars nor less than four dollars a week for a period of five hundred weeks from the date of the injury; but in no case shall the amount be more than four thousand dollars. If the employee leaves dependents only partially dependent upon his earnings for support at the time of his injury, the insurer shall pay such dependents a weekly compensation equal to the same proportion of the weekly payments for the benefit of persons wholly dependent

as the amount contributed by the employee to such partial dependents bears to the annual earnings of the deceased at the time of his injury. When weekly payments have been made to an injured employee before his death, the compensation under this paragraph to dependents shall begin from the date of the last of such payments, but shall not continue for more than five hundred weeks from the date of the injury.

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SECTION 34. While the incapacity for work resulting from the injury is total, the insurer shall pay the injured employee a weekly compensation equal to two-thirds of his average weekly wages, but not more than eighteen dollars nor less than nine dollars a week, except that the weekly compensation of the injured employee shall be equal to his average weekly wages in case such wages are less than nine dollars; and the period covered by such compensation shall not be greater than five hundred weeks nor the amount more than forty-five hundred dollars.

SECTION 35. While the capacity for work resulting from the injury is partial, the insurer shall pay the injured employee a weekly compensation equal to two-thirds of the difference between his average weekly wages before the injury and the average weekly wages which he is able to earn thereafter but not more than eighteen dollars a week; and the amount of such compensation shall not be more than forty-five hundred dollars.

SECTION 36. In case of the following specified injuries the amounts hereinafter named shall be paid in addition to all other compensation: . . .

[It is not thought necessary to print the details of the additional compensation.]

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SECTION 39. The compensation payable in case of the death of the injured employee shall be paid to his legal representative; or, if he has no legal representative, to his dependents; or, if he leaves no dependents, to the persons

to whom payment of the expenses for the last sickness and burial is due. If payment is made to the legal representative of the deceased employee, it shall be paid by him to the dependents or other persons entitled thereto under this chapter. When the appointment of a legal representative of a deceased employee, not otherwise necessary, is required to comply with this chapter, the insurer shall furnish or pay for legal services rendered in connection with the appointment of such representative, or in connection with his duties, and shall pay the necessary disbursements for such appointment, the necessary expenses of such representatives and reasonable compensation to him for time necessarily spent in complying therewith. Said payments shall be in addition to sums paid for compensations.

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SECTION 41. No proceedings for compensation for an injury shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless the claim for compensation with respect to such injury has been made within six months after its occurrence, or, in case of the death of the employee, or in the event of his physical or mental incapacity, within six months after death or the removal of such incapacity, or, in case an action against a third person is discontinued as provided in section fifteen, within thirty days after such discontinuance.

SECTION 42. The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured, or, in case of his death, by his legal representative, or by a person to whom payments may be due under this chapter, or by a person in behalf of any one of them. Any form of written communication signed by a person who may give the notice as above provided, containing the information that the person has been so injured, giving the time, place, and cause of the injury, shall be considered a sufficient notice.

SECTION 43. The notice shall be served upon the insurer or an officer or agent thereof, or upon the insured, or upon one insured person if there is more than one, or upon any officer or agent of a corporation if the insured is a corporation, by delivering it to the person on whom it is to be served, or leaving it at his residence or place of business, or by sending it by registered mail addressed to the person on whom it is to be served, at his last known residence or place of business.

SECTION 44. Such notice shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice.

SECTION 45. After an employee has received an injury, and from time to time thereafter during the continuance of his disability he shall, if requested by the insurer or insured, submit to an examination by a registered physician, furnished and paid for by the insurer or the insured. The employee may have a physician provided and paid for by himself present at the examination. If a physician provided by the employee is not present at the examination, it shall be the duty of the insurer to file with the department a copy of the report of its examining physician or physicians if and when such report is to be used as the basis of any order by the department. If the employee refuses to submit to the examination or in any way obstructs it, his right to compensation shall be suspended, and his compensation during the period of suspension may be forfeited.

SECTION 46. No agreement by any employee to waive his rights to compensation shall be valid, but an employee who is for any reason peculiarly susceptible to injury or who is peculiarly likely to become permanently or totally incapacitated by an injury may, at the discretion of the department,

and with its written approval within one month of the beginning of his employment, waive his rights to compensation under sections thirty-four, thirty-five and thirty-six, or any of them.

SECTION 47. No payment shall be assignable or subject to attachment, or be liable in any way for debts.

SECTION 48. Whenever the department deems it to be for the best interests of the employee or his dependents, and the parties agree, the liability for compensation may be redeemed by the payment in whole or in part by the insurer of a lump sum of an amount to be fixed by the department, not exceeding the amount provided by this chapter. The department, in the case of a minor who has received permanently disabling injuries, either partial or total, may at any time provide that he be compensated in whole or in part by the payment of a lump sum, of an amount to be fixed by the department, not exceeding the amount provided by this chapter.

SECTION 49. The claim for compensation shall be in writing, and shall state the time, place, cause and nature of the injury. It shall be signed by the person injured, or, in the event of his death, by his legal representative, or by a person to whom payments may be due, or by a person in behalf of any of them, and shall be filed with the department. A claim for compensation shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place, cause or nature of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Failure to make a claim within the time fixed by section forty-one shall not bar proceedings under this chapter if it is found that it was occasioned by mistake or other reasonable cause, or if it is found that the insurer was not prejudiced by the delay. In no case shall failure to make a claim bar proceedings if the insurer has executed an agreement in regard to compensation with the employee or made any payment for compensation under this chapter.

SECTION 50. Whenever any question involving the compensation of an injured employee or his dependents is appealed to the supreme judicial court, and the decision is in favor of the employee or his dependents, interest to the date of payment shall be paid by the insurer on all sums due as compensation to such employee or dependents.

SECTION 51. Whenever an employee is injured under circumstances entitling him to compensation, if it be established that the injured employee was of such age and experience when injured that, under natural conditions, his wages would be expected to increase, that fact may be considered in determining his weekly wages.

INSURANCE COMPANIES

SECTION 52. Any insurance company authorized to transact business in this commonwealth under sub-division (b) or (e) of the sixth clause of section forty-seven of chapter one hundred and seventy-five may, except as provided in clause (c) of section fifty-four of said chapter, insure the payment of the compensation provided for by this chapter, and when any such company insures the payment of such compensation it shall file with the commissioner of insurance its classifications of risks and premiums relating thereto and subsequent proposed classifications or premiums, which shall not take effect until approved by the commissioner of insurance as adequate and reasonable for the risks to which they respectively apply; provided, that upon petition of the company or any other party aggrieved the opinion of the commissioner shall be subject to review by the supreme judicial court. The commissioner may withdraw his approval.

SECTION 53. Any mutual liability insurance company authorized to do business in this commonwealth may with the approval of the commissioner of insurance distribute its risks into groups in accordance with the nature of the business and the degree of the liability of injury and with

like approval fix by and for such groups in accordance with the experience of each group all premiums, assessments and dividends; but all the funds of the company both actual and contingent shall be available for the payment of any claim against the company.

SECTION 54. Policies of workmen's compensation insurance issued or delivered in the commonwealth shall cover separately and for a separate consideration all the liabilities which are imposed upon an insurer by this chapter, whatever other contingencies may be insured by riders attached thereto or endorsements thereon. On the face of such policies shall be printed conspicuously the words: "Insurance under this policy is in Class of the company's Workmen's Compensation Classification Manual", and in the blank thus provided the number or other designation in said manual under which the said policy is written shall be placed before the policy is issued.

SECTION 55. No such policy of insurance shall be issued or delivered until a copy thereof has been filed with the commissioner of insurance at least thirty days prior to such issue or delivery, unless before the expiration of the thirty days the said commissioner shall have approved the form of the policy in writing, nor if the commissioner notifies the company in writing that in his opinion the form of said policy does not comply with the laws of the commonwealth, specifying the reasons for his opinion; provided, that upon petition of the company the opinion of the commissioner shall be subject to review by the supreme judicial court.

Any policy of insurance issued in violation of this section or of section fifty-six or sixty shall be valid and binding upon the company issuing it, and the rights, duties and obligations of the parties thereto shall be determined by this chapter and chapter one hundred and seventy-five.

SECTION 56. Two or more insurance companies authorized to issue such insurance policies in the commonwealth may unite in issuing joint and several workmen's compen-

sation policies which may be headed by the names of all such companies. Such policies shall be subject to approval by the commissioner of insurance.

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SECTION 63. Insurance companies insuring employees under this chapter shall, at the request of the department, furnish it in writing any information required in connection with the administration by said department of this chapter, including any statistics and the names of all employers insured by them.

SECTION 64. The insurer shall make and enforce reasonable rules and regulations for the prevention of injuries on the premises of insured persons, and for this purpose inspectors of the insurer shall have free access to all such premises during regular working hours. Insured persons or employees thereof aggrieved by such rules or regulations may petition the department of labor and industries for a review, and it may affirm, amend or annul the rule or regulation.

SECTION 65. For every case of personal injury resulting in death covered by this chapter, when there are no dependents, the insurance company shall pay into the treasury of the commonwealth one hundred dollars. Such payments shall constitute a special fund in the custody of the state treasurer who shall make payments therefrom upon the written order of the department for the purposes set forth in section thirty-seven.

MISCELLANEOUS PROVISIONS.

SECTION 66. In an action to recover damages for personal injury sustained by an employee in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defence:

1. That the employee was negligent;

2. That the injury was caused by the negligence of a fellow employee;

3. That the employee had assumed the risk of the injury.

SECTION 67. The preceding section shall not apply to actions to recover damages for personal injuries sustained by domestic servants and farm laborers, nor to actions for such injuries received by employees of an insured person.

SECTION 68. Chapter one hundred and fifty-three and sections four and seven to ten, inclusive, of chapter two hundred and twenty-nine shall not apply to employees of an insured person, nor to laborers, workmen or mechanics employed by any county, city, town or district subject to sections sixty-nine to seventy-five, inclusive, while this chapter is in effect.

. . . . . .

Sections 69 to 75, inclusive, deal with compensation to employees of the Commonwealth and of cities and towns.

These sections and sections 32, 33, part of section 36, sections 37, 38, 40, and 57 to 62, inclusive, which can have no bearing upon the questions involved, have been omitted.

MASSACHUSETTS GENERAL LAWS, C. 153.

LIABILITY OF EMPLOYERS TO EMPLOYEES FOR INJURIES NOT RESULTING IN DEATH.

Section 1. If personal injury is caused to an employee, who, at the time of the injury, is in the exercise of due care by reason of—

First, a defect in the condition of the ways, works or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied in consequence of, the negligence of the employer or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works or machinery were in proper condition; or

Second, The negligence of a person in the service of the employer who was intrusted with and was exercising super-

intendence and whose sole or principal duty was that of superintendence, or, in the absence of such superintendent, of a person acting as superintendent with the authority or consent of such employer; or

Third, The negligence of a person in the service of the employer who was in charge or control of a signal, switch, locomotive engine, elevated train or train upon a railroad or elevated railway;

The employee, or his legal representatives, shall, subject to the eight following sections, have the same rights to compensation and of action against the employer as if he had not been an employee, nor in the service, nor engaged in the work, of the employer.

A car in use by or in possession of a railroad corporation, or an elevated car in use by or in possession of an elevated railway corporation, shall be considered as a part of the ways, works or machinery of the corporation which uses or has it in possession, within the meaning of clause first, whether owned by such corporation or by some other company or person. One or more cars which are in motion, whether attached to an engine or not, shall constitute a train within the meaning of clause third, and whoever, as a part of his duty for the time being, physically controls or directs the movements of a signal, switch, locomotive engine, elevated train or train shall be deemed to be a person in charge or control of a signal, switch, locomotive engine, elevated train or train within the meaning of said clause.

This section shall not apply to injuries caused to domestic servants or farm laborers by fellow employees.

. . . . . .

Section 5. The amount of damages awarded in an action under section one for a personal injury to an employee, in which no damages for his death are awarded, shall not exceed four thousand dollars.

Section 6. No action for the recovery of damages for injury under section one of this chapter or for death under

section four or seven of chapter two hundred and twenty-nine shall be maintained unless notice of the time, place and cause of the injury is given to the employer within sixty days, and the action is commenced within one year, after the accident which causes the injury or death. Such notice shall be in writing, signed by the person injured or by a person in his behalf. If the person injured dies within the time required for giving the notice, his executor or administrator may give such notice within sixty days after his appointment; and in such case the action may be begun within one year after the appointment of such executor or administrator. If from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in this section, he may give it within ten days after such incapacity has been removed, and if he dies within said ten days his executor or administrator may give such notice within sixty days after his appointment. If the employer dies without such notice having been given and before the time for giving such notice has elapsed, the notice may be given to his executor or administrator, and the time within which the notice may be given as herein provided shall run from the appointment of the executor or administrator. A notice given under this section shall not be held invalid or insufficient solely by reason of an inaccuracy in stating the time, place or cause of the injury if it is shown that there was no intention to mislead, and that the employer was not in fact misled thereby. If the employer dies without such action having been brought and before the time for bringing the action has elapsed, the action may be begun against his executor or administrator not less than six months and not more than one year after the executor or administrator has given bond for the performance of his trust. Any form of written communication signed by the person so injured, or by some person in his behalf, or by his executor or administrator, or by some person in behalf of such executor or administrator, con-

taining the information that the person was so injured, giving the time, place and cause of the injury or death, shall be considered a sufficient notice.

MASSACHUSETTS GENERAL LAWS, c. 229.

ACTIONS FOR DEATH AND INJURIES RESULTING IN DEATH.

Section 4. If, as the result of the negligence of an employer himself, or of a person for whose negligence an employer is liable under section one of chapter one hundred and fifty-three, an employee is instantly killed, or dies without conscious suffering, his widow or, if he leaves no widow, his next of kin, who, at the time of his death, were dependent upon his wages for support, shall have a right of action for damages against the employer.. This section shall not apply to injuries caused to domestic servants or farm laborers by fellow employees.

United States Laws.

CONSTITUTION OF UNITED STATES, ARTICLE I, SECTION 8.

The congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; . . . and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

An Act Relating to the Liability of Common Carriers by Railroad to Their Employees in Certain Cases.

Act, Apr. 22, 1908, c. 149; 35 Stat. 65.

Section 1. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

. . . . . .

Section 3. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 4. In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Section 5. Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Section 6. (as amended by Act Apr. 5, 1910, c. 143, sec. 1): No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Section 7. The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

Section 8. Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

U.S. Code, Title 45, Chapter 1.

Safety Appliances and Equipment on Railroad Engines and Cars, and Protection of Employees and Travelers.

Section 1. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose. (Mar. 2, 1893, c. 196, §1, 27 Stat. 531.)

Section 2. It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. (Mar. 2, 1893, c. 196, §2, 27 Stat. 531.)

Section 3. When any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this chapter, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this chapter, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this chapter. (Mar. 2, 1893, c. 196, §3, 27 Stat. 531.)

Section 4. Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or hand holds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. (Mar. 2, 1893, c. 196, §4, 27 Stat. 531.)

Section 5. No freight cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the prescribed standard as to height of drawbars. (Mar. 2, 1893, c. 196, §5, 27 Stat. 531.)

Section 6. Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the preceding provisions of this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge; Provided, That nothing in this chapter contained shall apply to trains composed of four-wheel cars or to trains composed of eight-wheel standard logging cars where the height of such car from top of rail to center of coupling does not exceed twenty-five inches, or to locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs. (Mar. 2, 1893, c. 196, §6, 27 Stat. 532; Apr. 1, 1896, c. 87, 29 Stat. 85.)

Section 7. Any employee of any common carrier engaged in interstate commerce by railroad who may be injured by any locomotive, car, or train in use contrary to the

provision of this chapter shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge. (Mar. 2, 1893, c. 196, §8, 27 Stat. 532.)

Section 8. The preceding provisions and requirements of this chapter shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type; and the provisions and requirements relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section 6 of this chapter, or which are used upon street railways. (Mar. 2, 1903, c. 976, §1, 32 Stat. 943.)

Section 9. Whenever, as provided in this chapter, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said chapter, the interstate commerce commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said interstate commerce commission shall be subject to the like penalty as failure to comply with any requirement of this section. (Mar. 2, 1903, c. 976, §2, 32 Stat. 943.)

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Section 11. It shall be unlawful for any common carrier subject to the provisions of this chapter to haul, or permit to be hauled, or used on its line any car subject to the provisions of this chapter not equipped with appliances herein provided for, to wit; all cars must be equipped with secure sill steps and efficient handbrakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grab irons on their roofs at the tops of such ladders: provided, That in the loading and hauling of long commodities, requiring more than one car, the handbrakes may be omitted on all save one of the cars while they are thus combined for such purpose. (Apr. 14, 1910, c. 160, §2, 36 Stat. 298.)

Section 12. The number, dimensions, location, and manner of application of the appliances provided for by sections 4 and 11 of this chapter as designated by the interstate commerce commission shall remain as the standards of equipment to be used on all cars subject to the provisions of this chapter, unless changed by an order of said interstate commerce commission, to be made after full hearing and for good cause shown; and failure to comply with any such requirement of the interstate commerce commission shall be subject to a like penalty as failure to comply with any requirement of this chapter. Said commission is hereby given authority, after hearing, to modify or change, and to prescribe the standard height of drawbars and to fix the time within which such modification or change shall become effective and obligatory, and prior to the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard now fixed or the standard so prescribed, and after the time so fixed it shall be unlawful to use any car or vehicle in interstate or foreign traffic which does not comply with the standard so prescribed by the commission. (Apr. 14, 1910, c. 160, §3, 36 Stat. 298.)

Section 13. Any common carrier subject to this chapter using, hauling, or permitting to be used or hauled on its line, any car subject to the requirements of this chapter not equipped as provided in this chapter, shall be liable to a penalty of $100 for each and every such violation, to be recovered as provided in section 6 of this chapter: Provided, That where any car shall have been properly equipped, as provided in this chapter, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by this section or section 6 of this chapter, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this chapter; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain livestock or "perishable" freight. (Apr. 14, 1910, c. 160, §4, 36 Stat. 299.)

Section 14. Except that, within the limits specified in the preceding section of this chapter the movement of a car with defective or insecure equipment may be made without incurring the penalty provided by the statutes, but shall in all other respects be unlawful, nothing in sections 11, 12, and 13 of this chapter shall be held or construed to relieve any common carrier, the interstate commerce com-

mission, or any United States attorney from any of the provisions, powers, duties, liabilities, or requirements heretofore set out in this chapter; and, except as aforesaid, all of such provisions, powers, duties, requirements, and liabilities shall apply. (Apr. 14, 1910, c. 160, §5, 36 Stat. 299.)

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Section 16. The provisions of sections 11, 12, 13, 14 and 15 as to the equipment of cars with the designated safety appliances apply to every common carrier and every vehicle subject to what are commonly known as the "Safety Appliance Acts" set out in the first nine sections of this chapter. (Apr. 14, 1910, c. 160, §1, 36 Stat. 298.)

Section 17. It shall be unlawful for any common carrier engaged in interstate or foreign commerce by railroad to use any locomotive in moving interstate or foreign traffic or for any common carrier by railroad in any territory of the United States or the District of Columbia to use any locomotive, not equipped with an ash pan, which can be dumped or emptied and cleaned without the necessity of any employee going under such locomotive. (May 30, 1908, c. 225, §§ 1, 2, 35 Stat. 476.)

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Section 23. It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof, are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30 and 32 and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for. (June 7, 1924, c. 355, §2, 43 Stat. 659.)